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MILITARY JUSTICE AND COMBAT READINESS.(U)
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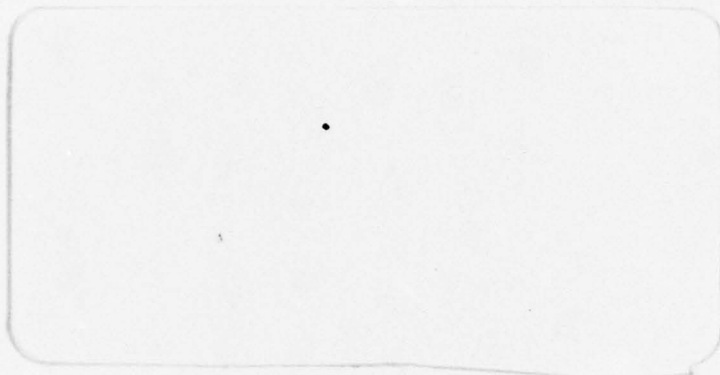
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REPORT DOCUMENTATION PAGE		READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER	2. GOVT ACCESSION NO.	3. RECIPIENT'S CATALOG NUMBER
4. TITLE (and Subtitle) 6 Military Justice and Combat Readiness.		5. TYPE OF REPORT & PERIOD COVERED 9 Final Final Rept.
7. AUTHOR(s) 10 George L. Bailey COL, USMC		6. PERFORMING ORG. REPORT NUMBER
8. PERFORMING ORGANIZATION NAME AND ADDRESS Center for Advanced Research Naval War College Newport, Rhode Island 02840		9. CONTRACT OR GRANT NUMBER(s)
11. CONTROLLING OFFICE NAME AND ADDRESS Center for Advanced Research Naval War College Newport, Rhode Island 02840		10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS 11
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office) 12 383p.		12. REPORT DATE June 1978
		13. NUMBER OF PAGES 335
		15. SECURITY CLASS. (of this report) UNCLASSIFIED
		15a. DECLASSIFICATION/DOWNGRADING SCHEDULE
16. DISTRIBUTION STATEMENT (of this Report) Approved for public release, distribution unlimited.		
17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)		
18. SUPPLEMENTARY NOTES This is the best available copy.		
19. KEY WORDS (Continue on reverse side if necessary and identify by block number) COMBAT READINESS; ANALYSTS; MILITARY TRAINING AND WARFARE; MILITARY STRATEGY; NAVY; MARINE CORPS; MILITARY LAW; LITIGATION		
20. ABSTRACT (Continue on reverse side if necessary and identify by block number) An analysis of the impact of our present military justice system on combat readiness is pursued by developing a method to quantify "justice", its cost, and its impact on combat training. The study demonstrates that military justice can be quantified and its cost can be calculated. The report also shows that the impact of the military justice system on combat training can be definitely shown by means of a surrogate measure - lost man-hours and physical resources expended on military justice matters which could have been expended on combat training. The study concludes further that our present military justice		

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concludes system is not only too costly, but also in need of major repair. The report contends that despite the noteworthy efforts of lawyers to remedy the situation, their present approach is too cumbersome for an easy solution, too complicated for anyone except the lawyer to understand, and too narrow to adequately cope with the needs of command. The study contends that only the military leaders can salvage the situation and they can do it only if they do two things: immediately exercise complete dominance over the matter and assist on a quantification of all factors involved. The report ends on a pessimistic note that if another Vietnam-type war should occur before remedial action is taken, the military justice system will prove to be exceedingly ineffectual, extremely expensive, and very disruptive to combat readiness.

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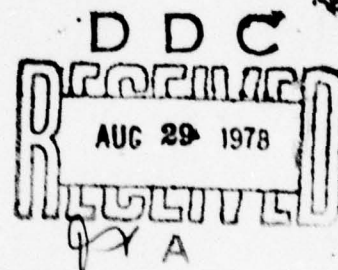
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EXECUTIVE SUMMARY

INTRODUCTION

This research report objectively describes and analyzes the cost of the military justice system and its impact on combat readiness. It is written primarily for the line officer and offers him a simplified method to assess military justice and its relationship to combat readiness.

BACKGROUND

The military justice system is presently caught up in a great controversy. The participants in this controversy -- the appellate court judges, the judge advocates general, and the military legal community -- have been exchanging charges and countercharges of impropriety. While this controversy has been flowering, the military justice system has appeared to have grown in cumbersomeness -- so much so that an accused can effectively turn any court-martial into an exceedingly expensive, complicated, and slow-moving process. A line officer's complaint that the system is too costly and unwieldy has been met by jurists with the conclusion that "a price tag cannot be placed on justice." What has been needed, in the author's opinion, is a method for the line officer to use in simplifying the numerous variables involved in the military justice system, and their interaction with the needs of command.

PURPOSE

The purpose of this study is to provide the line officer community with a simplified method to analyze the military justice system and the system's impact on combat readiness so that they might, themselves, bring about a more streamlined legal system for the armed services which would be less disruptive to combat readiness.

SCOPE

The scope of the research conducted for this report is service-wide. It includes an analysis of the entire military justice system and its impact on the combat readiness for all branches of the services. Although statistics were meager, attempts were made to locate and obtain applicable data from each of the services. The report's conclusions and recommendations apply to all line officers of every rank and branch of service.

CONCLUSIONS AND RECOMMENDATIONS

This report concludes that the military justice system is in urgent need of substantial repair. If another Vietnam-type war should occur before corrective action is taken, it is most probable that the system will prove to be unacceptably costly, time-consuming, and disruptive to combat readiness.

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This report recommends that the line officer community take over the lead in streamlining the military justice system by using the analytical approach suggested in the report. Other definitive recommendations include: the immediate abolition of certain extrinsic rights of the military accused; the establishment of record-keeping procedures needed to continually measure the cost of the military justice system and the extrinsic rights afforded accused by that system; the intensification of effort to prevent the elimination of administrative discharges to escape prosecution; and the establishment of a standing committee, composed only of line officers, to monitor the military justice system and its impact on combat readiness.

PREFACE

For years, the author observed the military justice system grow in complexity and cumbersomeness. He listened to the complaints of commanding officers and commanding generals as they ever increasingly became disenchanted with the system. He often wondered what the line officer community could do about the situation since their disenchantment was tied directly to their inability to comprehend the fluctuating nuances of the military justice system.

During 1975, the author worked for Major General John H. Miller, U.S. Marine Corps, who demonstrated to the author that, with the proper statistics, many factors can be quantified to a much higher degree than is usually thought. During 1976, the author worked for Lieutenant General K. McLennan, U.S. Marine Corps, who challenged him to articulate suggested action to rectify the present inadequacies of the military justice system.

Although the opinions and conclusions contained in this report are solely the author's, the study would not have been commenced without the inspiration he received from Generals McLennan and Miller. The author thanks them for their inspired leadership.

The author wishes also to thank his wife Jean. Her patience, secretarial assistance, and professional criticism

were of immeasurable value. A research project always entails many "lost" evenings and weekends. These evenings and weekends are available to the researcher only because his wife is willing to make the sacrifice. In this case, as it is with most research projects, this sacrifice is in no way small. It is hoped that this sacrifice will result in positive actions -- actions which will see the line officers assuming their rightful role in running the military justice system.

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CHAPTER I

INTRODUCTION

"You lawyers need to stop telling military leaders what they can not do and start telling them what they can do."

Admiral Harold Edson Shear, USN¹

This research report is written for the line officer who either already is a flag officer or aspires someday to be one. Although written by a lawyer, the report has intentionally been stripped of legalistic rhetoric.² It contains an indictment not just of the military justice system,³ but also an indictment of the line officers' attitude of laissez faire toward that system.⁴ It sets forth not only a challenge to the line officer to get involved,⁵ but also a warning that he may already be too late.⁶

Chapter II describes the upheaval taking place within the legal community of the armed services. Chapter III explains the need for line officer involvement. Chapter IV contains a suggested strategy for the line officer to follow in analyzing the military justice system. Chapter V describes the interplay among administrative discharges, non-judicial punishments, and courts-martial. Chapters VI through VIII set forth various rights presently afforded the serviceman, many of which could be modified or terminated by legislation. Chapter IX measures the overall cost of the

military justice system. Chapters X through XII measure the cost of several rights recently afforded the serviceman which are extrinsic to the Constitution. Chapter XIII contains a suggested strategy for the line officer to use in establishing the nexus between combat readiness and the cost of the military justice system. Chapter XIV concludes this report by setting out a number of recommended actions for the line officer to pursue.

CHAPTER II

TURMOIL IN THE MILITARY LEGAL COMMUNITY

It will be a grave error if by negligence we permit military law to become emasculated by allowing (judges) to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.¹

General William Tecumseh Sherman

1879

....the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.²

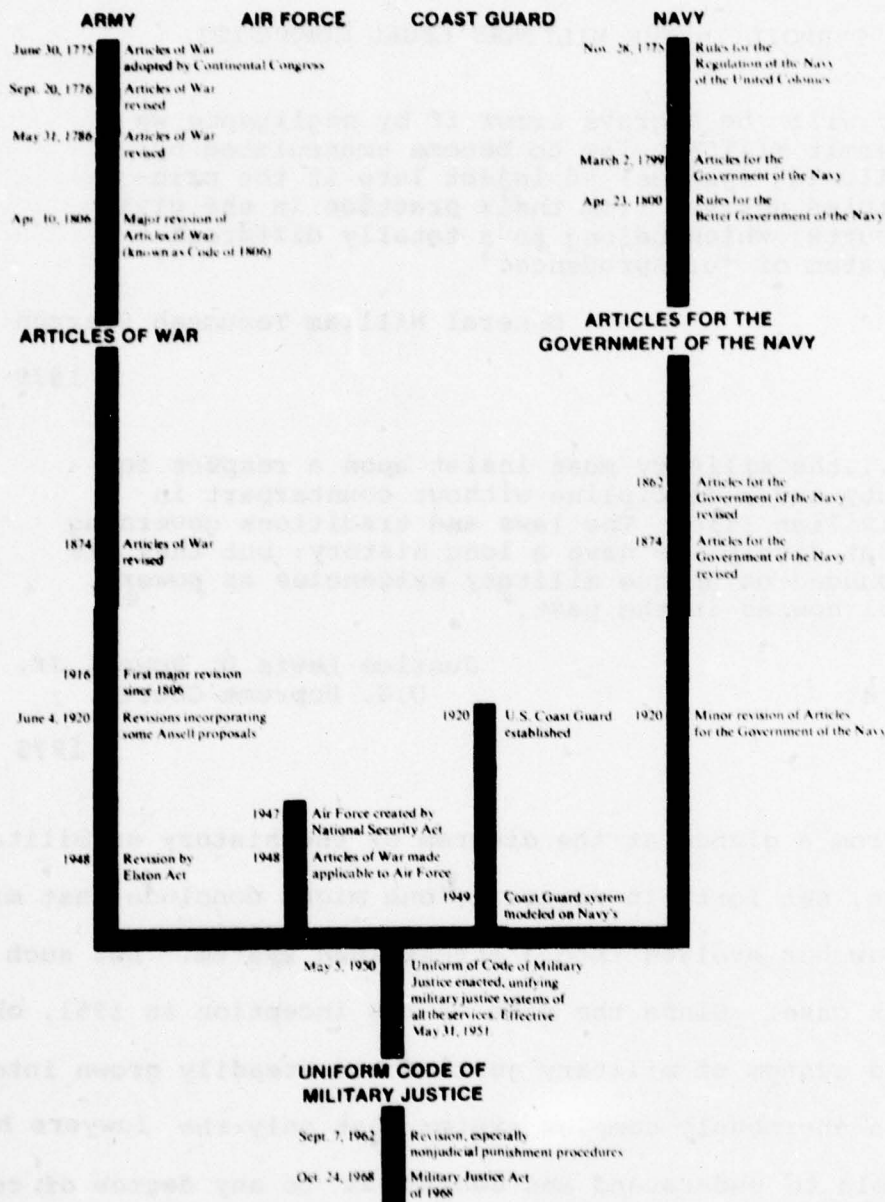
Justice Lewis F. Powell Jr.
U.S. Supreme Court

1975

From a glance at the diagram of the history of military justice, set forth in Figure 1,³ one might conclude that military law has evolved into a streamlined system. But such is not the case. Since the date of its inception in 1951, our unified system of military justice⁴ has steadily grown into such an enormously complex system that only the lawyers have been able to understand and control it to any degree of certainty.⁵ Recent events, however, indicate that even the lawyers' understanding and control of the system may be far more tenuous than previously thought.

FIGURE 1

SCHEMATIC HISTORY OF AMERICAN JUSTICE



SOURCE: Homer E. Moyer, Jr., Justice and the Military (Washington: The Public Law Education Institute, 1972), p. 9. Copyrighted © 1972, Public Law Education Institute. Reprinted with permission of the Public Law Education Institute.

Never, in its 27-year history, has our unified system of military law been exposed to more turmoil and uncertainty than it is today.⁶ During the past few years, as Appendix I reflects, the Court of Military Appeals has rendered numerous decisions which have far-reaching impact on the commander's time and physical resources. They have also created gross insubordination.⁷

Appendix II is an excerpt from a periodical, published by the Judge Advocate General of the Navy, wherein he informs his subordinates, in effect, that the Court of Military Appeals' decisions in United States v. Catlow⁸ and United States v. Russo⁹ were contrary to the Supreme Court case of In re Grimley.¹⁰ In paragraph 5 of Appendix II, the Judge Advocate General of the Navy notes:

. . . the cases cited by the Court of Military Appeals. . . do not support the proposition for which advanced.

In the case of O'Callahan v. Parker,¹¹ the Supreme Court held that courts-martial possess no jurisdiction to try offenses which are not "service-connected." In the case of Schlesinger v. Councilman,¹² the Supreme Court appeared to sanction the Court of Military Appeals'

subsequent decision in United States v. Beeker¹³ that drugs are inherently service-connected. In that decision, Mr. Justice Powell observed:¹⁴

It is not surprising, in view of the (nature and magnitude of the military drug abuse) problem, that in United States v. Beeker the Court of Military Appeals found that the "use of marihuana and narcotics by military personnel on or off-base has special military significance" in light of the "disastrous effects" of the substances "on the health, morale and fitness for duty of persons in the armed forces."

On 24 September 1976, in the case of United States v. McCarthy,¹⁵ the Court of Military Appeals overruled the Beeker case and held that off-post, off-duty drug offenses by servicemen do not automatically present special danger to the military community. The Navy Court of Military Review at first appeared to follow the McCarthy decision,¹⁶ but in a series of cases thereafter¹⁷ managed to find "exceptions" to the seemingly clear dictates of the Court of Military Appeals.¹⁸ The Air Force Court of Military Review, in a series of cases, also found "exceptions" to the dictates of the McCarthy decision.¹⁹

Finally, in the case of United States v. Alef,²⁰ the Court of Military Appeals reacted to these lower appellate court decisions. The Court of Military Appeals not only overruled the Air Force Court of Military Review decision in that case, but found that there was no evidence of any service connection whatsoever. In admonishing the Court

of Military Review, the Court of Military Appeals went on to say:

....we have been beset by a barrage of theories utilized to find service-connection, but which bear no relation to the analysis set forth in McCarthy.²¹

In a footnote in the Alef decision, the Court of Military Appeals complained:

We must further note that the Courts of Military Review have persisted in the utilization of such theories to find jurisdiction even in those cases where proper Relford-McCarthy analysis would have resulted in a finding of no court-martial jurisdiction.²²

On 11 October 1977, in apparent contradiction to a Supreme Court decision, the Court of Military Appeals ruled in United States v. Booker²³ that civil-type offenses could no longer be tried by summary court-martial. On 30 March 1978, as Appendix III reveals, the Navy Court of Military Review not only severely criticized the Court of Military Appeals for the "lack in logic and meaning" of the Booker decision, but went on to say:

....it is quite certain that few, if any, military lawyers, after reading Booker, have a truly comprehensive view of the course that military justice, both in spirit and in practice, is following.²⁴

A cursory reading of Appendix IV corroborates the assertion that there is a widespread lack of understanding of military criminal law today.²⁵ In fact, it indicates that no one in the legal community may know what the military

criminal law is today, including the Judges of the Court of Military Appeals.

If those running the military justice system do not understand what the military criminal law is today, who does? The answer is, the accused through his defense counsel does. They recognize legal ambiguity when they see it and, as Appendix V shows, the defense thrives upon it. The memorandum contained in Appendix V was written in the office of the Appellate Defense Section, Navy Appellate Review Activity, Navy JAG, Washington, D.C. and was provided all Navy and Marine Corps defense counsel during the fall of 1976. A plain reading of its language reveals the fact that defense counsel are swift in detecting ambiguity. In fact, the memorandum contains numerous definitive suggestions as to what action the accused's defense counsel might take to aggravate any existing ambiguity.

The letters set forth in Appendix VI, VII, and VIII also appear to support the assertion that the accused and his defense counsel are ever vigilant to any weaknesses in the military justice system which will adhere to the benefit of the accused. Their alertness can, as Appendix VI reveals, prevent a court-martial from even being held while the unit is on deployment -- even a six-months deployment.

Many senior lawyers who specialize in military criminal law are worried that the present state of the law is such that the military justice system would no longer

operate effectively, should there be another Vietnam-type war.²⁶ They believe that the accused's rights today are so complex and far-reaching that any alert defense counsel can turn any future court-martial, held in some distant country, into an exceedingly expensive proposition for the military commander in terms of time and money.²⁷

During the Vietnam War, there were hundreds of murder, rape, and serious assault cases.²⁸ Had the accused in each of those cases had the rights he has today, it is most doubtful that these trials could have been successfully completed. Had the accused been able to raise the Catlow/Russo motion,²⁹ for example, he could have insisted that the recruiters and all witnesses to his enlistment be transported to Vietnam and appear personally in Court.³⁰ If one of those witnesses happened to be a parent who was afraid or unable to travel long distances, the court (including the accused, the defense and trial counsel, and the military judge) would probably have had to travel to where the parent was residing in the United States and obtain his or her testimony.³¹ The Court would then have had to return to Vietnam where the "jury"³² and the other witnesses to the trial were situated.

In response to the argument that the Catlow/Russo issue would not be an issue in the next war because of better recruiting, one needs to only read Appendix VIII. Moreover,

because the issue deals with a jurisdictional matter, it is difficult to see how the Court of Military Appeals could relax the rules regarding the right to make a Catlow/Russo motion just because the trial takes place in a war zone.³³ Even if the Court of Military Appeals might subsequently decide to relax one of its prior evidentiary rulings, few military judges would dare risk the validity of a murder or rape conviction on the mere possibility the Court might relax one of its rules.³⁴ Thus, the military judge, on the trial level, will usually adhere to the plain reading of the higher Court's decision and, where the law is ambiguous, he will usually rule in favor of the accused. He does this because he knows from experience that a rehearing of a murder, rape or serious assault case in a war zone, involving foreign and/or transient witnesses, is a most tenuous matter.³⁵

Despite the already existing uncertainty within the military criminal law community, changes to the law and the military justice system are continually being made by either the Judge Advocates General or the Judges of the Court of Military Appeals. Appendices IX and X reflect a few such changes within the U.S. Army. Appendix XI is a list of proposed changes submitted by Chief Judge Fletcher of the Court of Military Appeals. Appendix XII shows the status of these proposed changes as of March 1978, and Appendix XIII indicates the priority assigned to some of these proposed changes.

There are other proposed legislative changes in existence, in addition to those mentioned in Appendices IX through XI, During 1975, the Air Force drafted a number of proposed legislative changes. The primary purpose for initiating this proposed legislation was to simplify and reduce workloads created by the present system. This would be accomplished primarily by eliminating the requirements for automatic appellate reviews: verbatim records; pretrial Staff Judge Advocate advise letters; and posttrial Staff Judge Advocate review letters (regarding the legality of findings only). The proposed legislation would also give the service secretaries final authority to determine the availability of counsel and permit a videotape for a trial record. Despite the obvious workload savings these proposals would engender, they have not progressed beyond the Department of Defense level. The primary reason for this delay is the fact that, as one judge advocate general stated, "it is most difficult to get the various branches of the service to agree on anything."³⁶

While the proposed changes are discussed in the various committees, while the ambiguity in the military criminal law seemingly increases, and while the judge advocates general and the Court of Military Appeals vie for control over the military justice system, what is the commanding

officer on the company level doing? Appendix XIV appears to answer that question with respect to at least one such commander. If it is any indication, commanders on the lower level are in urgent need for someone to intervene. Who should it be? -- more lawyers? -- a GAO team? -- a task force? The author is of the opinion that the answer is, the line officer community. The next chapter will discuss why this is so.

CHAPTER III

THE NEED FOR LINE OFFICER INVOLVEMENT

It cannot be gainsaid that any factor that substantially impinges upon combat readiness is of concern to all commanding officers. The military justice system is one of those factors. It impinges upon combat readiness in a number of ways. The two most obvious are the man-hours and physical resources that the system consumes -- man-hours and physical resources that could be utilized for combat training.¹

The rate of the military justice system's consumption of resources is not static. As the previous chapter discussed, the rate is and has been steadily increasing over the years.² Because of its drain on the availability of resources for combat training, this continued increase is a serious matter. Will it ever cease increasing? Our budgetary resources are dwindling.³ Commanding officers are being charged with readjusting to an austere budget by "making up in quality" what they "lack in numbers."⁴ Will the military justice system also readjust itself to a more austere budget? The answers to these questions appear to be no -- especially since the system appears to be functioning out of control.⁵

It is the author's opinion that the line officers are being misled -- not intentionally perhaps, but nevertheless, misled.⁶ They are being misled three ways: first, they do not appear to realize that they themselves are just as qualified as any other group to bring about a diminishment of the resource requirements of the military justice system.⁷ Second, they do not seem to realize that a "price tag can be put on justice," especially military justice.⁸ Third, they do not appear to realize that each of the various groups already working independently on the "problem" considers its group to be the only one qualified to recommend changes to the military justice system.⁹

The next chapter will explain what line officers can do to rectify the present unsatisfactory situation and will offer them a strategy to follow. But, before they turn to such matters, line officers should realize, once and for all, that only they can bring about the changes needed to make the military justice system more compatible with combat readiness. Not only do all other groups connected with the military justice system show very little desire to work closely with the line officer community to minimize the military justice system's impact on combat readiness, they also show little desire to work together among themselves.

The lawyers, as a group, appear to be of the opinion that only they are qualified to make such changes. The following

excerpt from the introduction to the 1975 edition of the "Cases and Materials on the Analysis of the Military Criminal Legal System", published by the Judge Advocate General's Corps, U.S. Army, is illustrative of this point.¹⁰

. . . If the military criminal legal system as it currently exists is ideal, so be it. On the other hand, if change is needed, then that change should come from within if at all possible, and, if change is indeed needed, it should come from those most familiar with the present system--the officers of the Judge Advocate General's Corps. (Emphasis added).

As evidenced by Appendices XVI through XVIII, the judge advocates general, especially the Judge Advocate General of the Navy, have been active in articulating their displeasure with the present inadequacies of the military justice system. During March 1978, the Judge Advocate General of the Air Force even directed that a study be conducted to determine the impact of the military justice system on combat readiness. However, as Appendix XVIII reveals, the results of this study show that the offices of the judge advocates general do not possess the necessary data or power needed to articulate the nexus between the military justice system and combat readiness.¹¹

As Appendices IV and XI reveal, the Chief Judge of the Court of Military Appeals believes the Court is capable of formulating recommended changes without any organized input from the line officer community. During a recent interview, the Chief Judge of that Court is alleged to have complained that the military was ignoring the recommendations set forth in Appendix XI.¹² He is alleged to have

continued further with a warning that the Court of Military Appeals would not wait for legislative change with respect to 25 of the 50 recommendations, but would effect the changes by means of judicial opinions.¹³

Although Appendix XIX demonstrates that the service chiefs are aware of the inadequacies of the military justice system, it also indicates that the chiefs may be expecting the lawyers alone to rectify the present unsatisfactory situation. The author could find no concerted effort on the service chief level that would indicate otherwise.¹⁴

Within the office of the Department of Defense there appears to be little appreciation for the value of organized input from the line officer community. Although the General Counsel for the Department of Defense has shown concern for the present state of the military justice system by recommending the abolishment of the Court of Military Appeals,¹⁵ the author could find no senior military lawyer who believed such action would ever be taken. Furthermore, the author could find no standing committee within the Department of Defense which possessed both line officer membership and a precept to formulate changes to the military justice system. Although there is a standing working committee which has as its purpose the formulation of recommended changes to the Code, this committee is composed entirely of judge advocates and representatives from the Court of Military Appeals.¹⁶

This committee was formed in furtherance of the provision of the Uniform Code of Military Justice which charges the judge advocate general and the Court of Military Appeals to formulate changes to the Code on a continuing basis. However, such a provision does not preclude either line officer input or line officer representation.¹⁷

The Secretary of Defense commissioned, six years ago, a Task Force on the Administration of Military Justice to, among other things, recommend "ways to strengthen the military justice system and enhance the opportunity for equal justice for every American serviceman and woman."¹⁸ However, this task force did not make any recommendations that would help the commanding officer to conserve his resources. Instead, it recommended numerous changes that would consume a considerable quantity of the man-hours and physical resources over and above that already required.¹⁹ Moreover, of the 28 individuals assigned either as members of the task force or their staff assistants, only one was a line officer. The majority of the remaining 27 individuals were either military lawyers or civilians.²⁰

Teams from the Government Audit Office (GAO) are constantly conducting independent studies regarding our military justice system as if only they were qualified to recommend changes.²¹ Notwithstanding the fact that the survey questions posed and the interpretation of the answers given regarding any complex, highly technical and far-reaching

system are no better than the qualifications of the investigator, some of these GAO teams have consisted of individuals with neither legal nor combat training backgrounds.²² Yet based on the results of these team surveys, the GAO submits definitive recommendations which have a major impact on both the military justice system and combat readiness.²³ Appendix XX sets forth an overview of the results of the GAO's latest survey. As is obvious from its report, the GAO is recommending that the numbers of special and general courts-martial be substantially increased by eliminating discharges to escape prosecution.²⁴

The Congress has enacted no legislative changes to the Code since 1968. In 1976, the President announced that this country's future foreign policy would include an emphasis on human rights.²⁵ As long as military justice is described in nonquantifiable terms, it is unlikely that Congress would, on its own, take action contrary to this country's emphasis on human rights by diminishing the rights of military accused. However, if it could be shown that many of these rights are extrinsic²⁶ to the Constitution and are impacting adversely on our country's combat readiness, it is most likely that Congress would take positive action.

Based on the above, the line officers can conclude that little is presently being done to ensure that future changes to the military justice system will be compatible

with combat readiness. It is the author's opinion that nothing will be done in this regard until the line officer community becomes directly involved in the matter.²⁷ The next chapter will describe how this can best be done.

CHAPTER IV

FORMULATING A STRATEGY FOR ANALYSIS

In order for the line officer's input to any discussion regarding legal reform to be meaningful, he must develop a simplified system which will permit him to come to grips with the numerous variables involved. First, he must realize that there has been a continual movement for the civilianization of military law during the past 50 years.¹ Although this movement has resulted in tremendous changes to the military justice system, it appears that some legal scholars are not going to be satisfied until it is totally civilianized.² Each year we find more legal articles criticizing military law and clamoring for more changes.³ Second, the line officer must not be hasty in his conclusions, for as one scholar wrote:⁴

Very little analysis has been made as to what standards of justice should be required of a military law system and as to what the actual effects on the military would be of adapting to civilian standards. (Emphasis added.)

Third, while it is the line officer who can best articulate what the actual effects will be of any change,⁵ for him to do so, he must not allow himself to be confused by irrelevant legal terms and concepts.⁶ Although the Manual for Courts-Martial, the U.C.M.J., and the U.S. Court of Military Appeals may presently grant a military accused a certain substantive or procedural right,⁷ the basic issue

relevant to any question of reform is whether that particular right is protected by the U.S. Constitution as interpreted by the U.S. Supreme Court.⁸ If it is, then the right must be protected. If, on the other hand, the right emanates from a lower source, it can be legislated away or modified.⁹ Of course, it must be remembered that until it is actually legislated away, the right still exists and it must be honored in its entirety.

The line officer must not be confused between rights and safeguards; between rights and procedures; between rights and structure; and between rights and control. From his point of view and to maintain clarity in his thinking, the line officer needs to view all aspects of the military justice system in terms of rights.¹⁰ The U.S. Constitution protects rights. If the Constitution is interpreted as requiring a military accused be isolated from the commander's influence in a certain regard, then it is protecting a right -- a right of the military accused not to have that part of his case influenced by the commanding officer. If the Constitution is not so interpreted, then the military accused doesn't have that constitutional right.¹¹ Whether it is termed a procedural safeguard,¹² a reorganization of the structure,¹³ a judicialization of control,¹⁴ or a civilianization of the military justice system,¹⁵ it is still a right. Regardless of what it is termed, only three questions are relevant: What is the right involved? Is the right constitutionally protected? And if the right is not constitutionally protected,

is the right deleterious to the maintenance of combat readiness?

By adopting this strategy, the line officer can insist on a greater degree of quantification¹⁶ of those factors usually considered nonquantifiable.¹⁷ Rights of an accused may be broken down into two categories: rights intrinsic to the Constitution and rights extrinsic to the Constitution.¹⁸

Last, but not least, the line officer must cope with the generally overlooked fact that there are many rights granted to a military accused, which the U.S. Court of Military Appeals has termed to be constitutional rights, but which have never been held by the U.S. Supreme Court as applying to the military accused.¹⁹ Since there is presently no appeal from a decision of the U.S. Court of Military Appeals, by either the government or the accused,²⁰ the fact the Supreme Court has not yet declared such rights to be applicable to the military accused can be confusing to the non-lawyer. Inasmuch as legislation could be enacted to authorize further appeal of military cases to the Supreme Court,²¹ the line officer would be wise to merely categorize these rights as also being extrinsic to the Constitution. Such a categorization does not mean such rights can be ignored. It means merely that for purposes of discussion on military justice, such rights should be looked at critically. If these particular rights are too costly, perhaps previously proposed legislation to authorize the government and the

military accused the right to further appeal should be favorably considered. Once the Supreme Court has ruled on the matter, the military will know for certain whether these rights are, in fact, constitutionally protected.²²

In summary, the line officers' strategy should be a four-step procedure: (1) isolate each proposed or existing right in question from the legal rhetoric; (2) determine whether the proposed or existing right is constitutionally protected; (3) measure the dollar and man-hour cost of that right if it is extrinsic to the Constitution; and (4) determine whether the United States can afford the cost of that extrinsic right in terms of a decrease in combat readiness, keeping in mind that while a single extrinsic right by itself may not be too costly, when added to the thousands that already exist, the cost may be prohibitive.

Which rights should the line officers examine? Should they include the administrative discharge system as a subsystem of the larger military justice system? The next chapter will discuss why the author believes the answer is yes.

CHAPTER V

INTERPLAY AMONG COURTS-MARTIAL, NONJUDICIAL PUNISHMENTS, AND ADMINISTRATIVE DISCHARGES

Since all services keep their statistics for courts-martial and nonjudicial punishments separate from their statistics for administrative discharges,¹ it is apparent that there is a widespread lack of appreciation for the interplay involving the utilization of these three different types of proceedings. Few appear to recognize the fact that commanding officers frequently resort to the use of administrative discharges as a substitute for the more costly and, in their minds at least, more inefficient court-martial proceedings.² As the cost and inefficiency of courts-martial increases, the commander's reliance on courts-martial proceedings decreases and his use of administrative discharges increases. Conversely, as higher echelons discourage the use of administrative discharges, by establishing quotas and procedural constraints, the utilization of administrative discharges decreases, while the use of courts-martial increases. Nonjudicial punishment proceedings may be used as a substitute for either proceeding. Figure 2 illustrates how this interplay works.

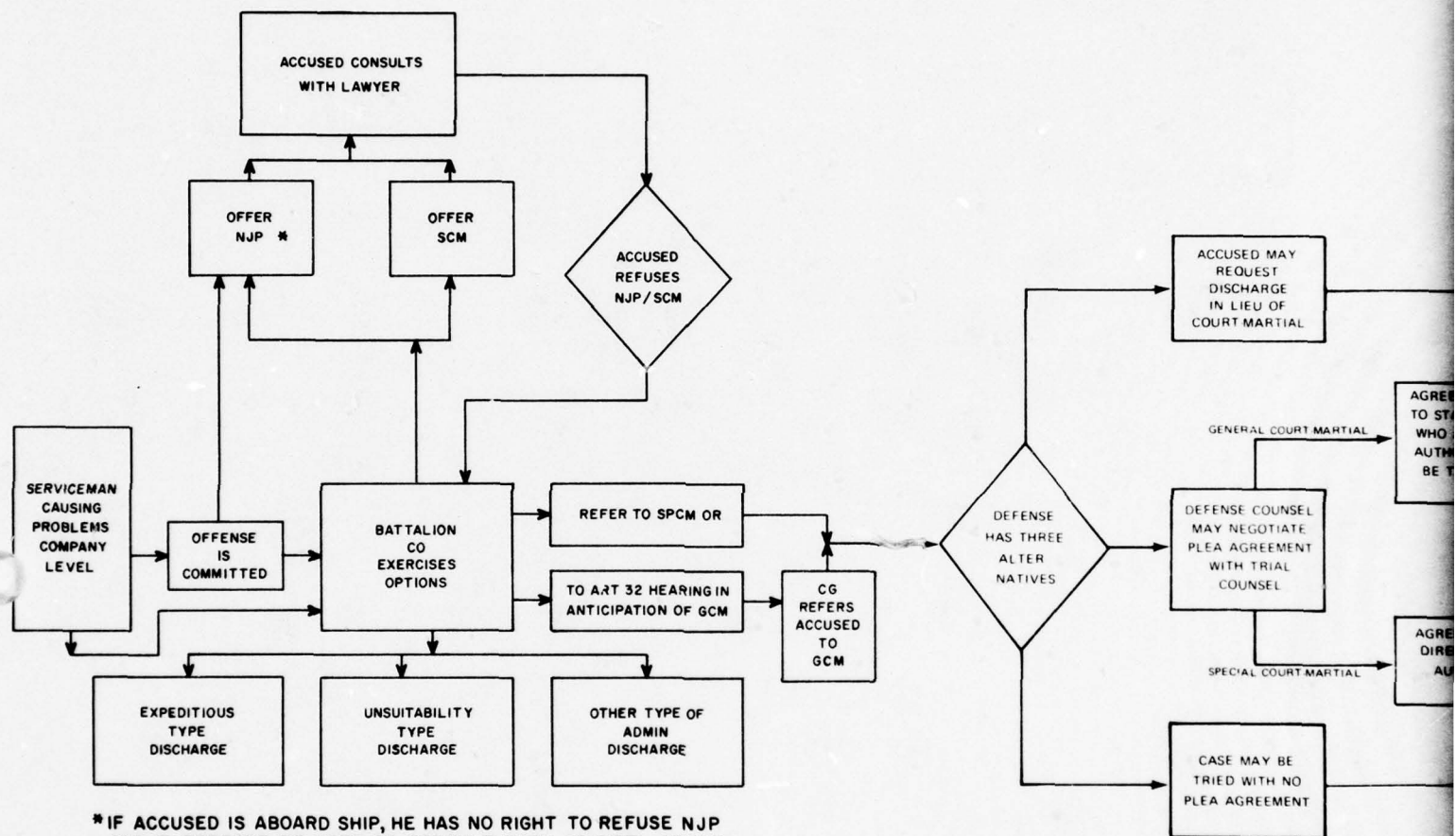
The line officer on the lower level well understands the above described interplay. In fact his understanding of this interplay is far superior to that of most other individuals, military or civilian.³ First, he knows from

his own observations the disruptive effect one "troublemaker" can cause a unit on the lower level. Second, he knows from such guidance, as shown in Appendix XXII, that at the top of his commanding general's priority list are combat readiness and unit training. Third, as the report in Appendix XXIII demonstrates, he is personally aware of the numerous factors competing for the unit leader's time and resources. Fourth, he knows that there are always a number of options available to the unit leader for dealing with any particular "troublemaker." (He may even receive correspondence, such as that found in Appendix XXIV encouraging him to take the less expensive way out).⁴ Fifth, he knows that the pressures of the moment will have a great influence on what option the unit leader will select in dealing with any particular serviceman who is causing problems for his unit.

As the diagram in Figure 2 illustrates, when confronted with a serviceman who is being disruptive to his command, the unit leader has a number of options. If the serviceman in question appears to be a recidivist, unrehabilitatable, or difficult to prove a case against, the unit leader may not choose to wait until the serviceman actually commits a provable crime. He may, instead, take immediate steps to process the serviceman for an administrative discharge. As Table I reveals, there are numerous bases for discharging a serviceman. The easiest and quickest to utilize is the

Figure 2

VARIOUS OPTIONS FOR HANDLING DISCIPLINE



*IF ACCUSED IS ABOARD SHIP, HE HAS NO RIGHT TO REFUSE NJP AND, THEREFORE, NO NEED TO CONSULT WITH COUNSEL ABOUT CHOICE.

Figure 2

HANDLING DISCIPLINARY PROBLEMS

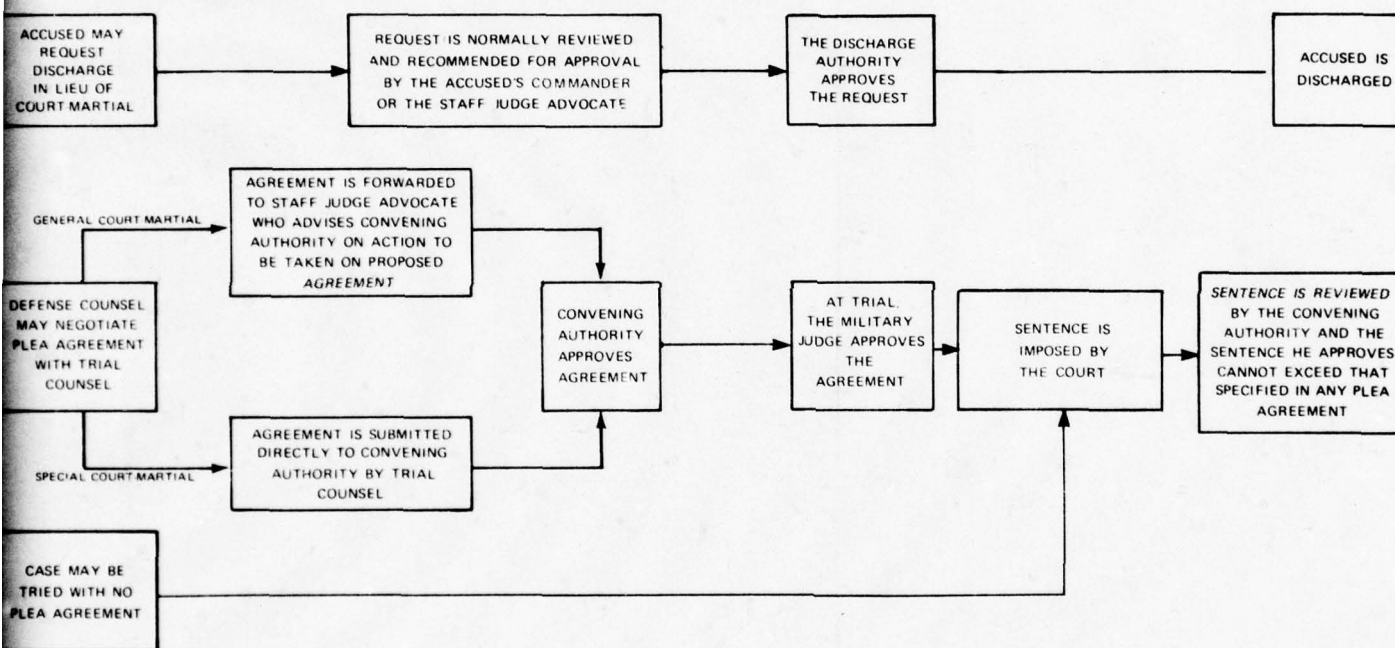


TABLE I
FISCAL YEARS 1976 AND 1977
ADMINISTRATIVE DISCHARGE STATISTICS FOR U.S. AIR FORCE

<u>AFM 39-12</u>	<u>FY 76</u>	<u>FY 77</u>
<u>Section A. (Unsuitability)</u>		
2-4-a - Inaptitude	85	32
2-4-b - Personality Disorder	1129	1179
2-4-c - Apathy, Defective Attitude	2723	2660
2-4-d - (Res)		
2-4-e - Alcohol Abuse	119	141
2-4-f - Homosexual-Sexual	155	184
2-4-g - Financial Irresponsibility	241	190
2-4-h - Unsanitary Habits	4	7
Unspecified	24	9
	<u>4908</u>	<u>4402</u>
<u>Section B. (Gen Misconduct)</u>		
2-15-a - Frequent Involvement	923	584
2-15-b - Sexual Perversion	100	71
2-15-c - Drug Abuse	292	450
2-15-d - Shirking	30	16
2-15-e - Dishonorable Failure to Pay Debts	14	14
2-15-f - Dishonorable Failure to Support Dependents	0	2
	<u>1364</u>	<u>1137</u>
<u>Section C. (Civil Court Conviction)</u>	360	354
<u>Section D. (Fraud Enlistment)</u>	82	78
<u>Section F. (Discharge in lieu Court-Martial)</u>	462	307
	<u>7177</u>	<u>6624</u>
<u>AFM 39-10</u>	<u>FY 76</u>	<u>FY 77</u>
3-81 Marginal Performers	--	9016
3-85 Overweight	--	832
Others	---	712
		<u>10560</u>
		<u>6624</u>
		<u>17184</u>

SOURCE: Table provided author on 13 April, 1978 by Criminal Law Division, AF JAG, Washington, D.C.

expeditious-type discharge. All services now have this type of discharge⁵ and to "qualify," the serviceman must not have less than six months and not more than three years of active duty. Table II shows the total number of these discharges awarded by the armed services during the past two years.⁶ Tables III and IV show that, in some commands, the use of this type of discharge is on the increase, while the rate of court-martial and nonjudicial punishments is on the decrease.

In order to keep the number of the unit's expeditious discharges to an amount acceptable by higher echelons, the leader may first ascertain whether the serviceman can "qualify" for an unsuitability or misconduct-type discharge.⁷ (The use of unfitness-type discharges was discontinued in 1976).

Although regulations preclude the utilization of expeditious, unsuitability, and misconduct-type discharges in those cases where the accused is pending disciplinary action, the commander often rationalizes himself out of this constraint.⁸ Even when a crime has been committed, the unit leader often ignores the existence of the crime, forgives the commission of the crimes, or lets the serviceman off with a warning. If he takes this approach, he can still discharge the serviceman administratively without violating the so-called "letter" of the regulation.⁹

If a crime is committed and punishment is deemed to be warranted, he may offer nonjudicial punishment or a summary court-martial. The accused, under a recent court decision,¹⁰

TABLE II
DISPOSITION STATISTICS FOR FISCAL YEARS
1974, 1975, 1976 and 1977 BY ARMED SERVICE

	FY 1974				FY 1975				ARMY
	ARMY	NAVY	MARINE CORPS	AF	ARMY	NAVY	MARINE CORPS	AF	
	799,301	555,753	191,044	691,595	790,741	545,274	193,156	602,285	783,748
# GCMs	1,848	187	422	268	1,635	171	520	227	1,476
# SPCMs	14,814	5,389	7,597	2,573	10,525	5,701	7,657	1,136	6,929
# SCMs	5,325	3,978	4,963	106	4,118	3,763	4,943	60	2,059
# NJPs	175,292	112,766	70,795	37,556	169,556	107,417	65,784	23,368	159,918
# GOS Disch.	17,672	2,266	2,728	285	14,055	2,790	3,437	601	16,055
# Expeditious Discharges	2,565	Unavail	None	Unavail	12,243	Unavail	None	Unavail	20,888#
# Unsuitable Discharges	11,415	Unavail	4,450	Unavail	10,445	Unavail	7,505	Unavail	7,807
# Unfitness/Misconduct	9,858	Unavail	3,716	Unavail	9,184	Unavail	3,819	Unavail	7,412
TOTAL	238,789	Not Totalled	94,671	Not Totalled	231,422	Not Totalled	92,629	Not Totalled	222,544

Source: Court-martial and nonjudicial punishment rates compiled from statistics obtained from official records of the JAGs of the respective services shown. Admin discharge statistics compiled from official records of the respective services shown.

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CORPS	AF	FY 1976				FY 1977			
		ARMY	NAVY	MARINE CORPS	AF	ARMY	NAVY	MARINE CORPS	AF
6	602,285	783,748	528,775	194,422	602,285	783,485	527,783	189,211	586,433
0	227	1,476	235	401	227	1,166	205	211	166
7	1,136	6,929	4,942	5,812	1,136	5,110	4,477	3,590	807
3	60	2,059	3,611	3,984	60	1,976	4,584	2,358	25
4	23,368	159,918	96,934	60,076	26,358	166,368	88,860	48,856	21,015
7	601	16,055	2,446	7,976	462	9,711	2,250	3,746	307
	Unavail	20,888*	1,764	2,644	10,385	16,226*	1,616	2,027	10,560
5	Unavail	7,807	16,277	8,541	4,402	5,082	17,816	4,946	4,012
2	Unavail	7,412	7,379	4,069	1,806	4,584	8,066	1,756	1,569
9	Not Totalled	222,544	133,588	93,503	44,846	210,653*	127,874	67,390	38,461

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om official

*Does not include 3,974 honorably separated for drug abuse or 18,116 discharged under the trainee discharge program.

#These figures do not include those separated under the Army's Trainee Discharge Program. For fiscal year 1976, the Army discharged 21,876 "trainees" under this program.

\$Fiscal year 1977 statistics for courts-martial and nonjudicial punishment are not available in the Navy. Statistics shown are for the period 1Jul76 - 30Jun77.

TABLE III

JUDICIAL FORUM BY TYPE
2d MARINE DIVISION, CAMP LEJEUNE, N.C.

CY 1976

NJP	753	737	845	967	726	620	668	651	515	425	562	647
NON BCD/SPCM	60	72	92	77	61	65	46	74	57	53	69	74
BCD/SPCM	10	17	17	12	14	12	5	10	9	7	16	9
SUMMARY CM	86	54	86	72	79	42	57	74	28	34	39	48
GENERAL CM	1	1	2	5	0	2	1	0	0	2	3	5
TOTAL	911	882	1044	1138	880	743	778	809	609	521	689	783

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
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CY 1977

NJP	581	712	718	836	788	662	818	740	620	624	693	532
NON BCD/SPCM	74	68	81	57	47	34	50	58	56	44	47	50
BCD/SPCM	12	26	25	10	12	19	13	23	17	8	11	12
SUMMARY CM	50	50	64	57	52	46	51	54	37	48	45	53
GENERAL CM	3	5	3	1	5	8	1	4	5	1	4	8
TOTAL	720	861	891	961	904	769	933	879	735	725	800	655

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
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CY 1978

NJP	667	637	472
NON BCD/SPCM	39	45	43
BCD/SPCM	11	10	7
SUMMARY CM	35	44	48
GENERAL CM	3	2	2

TOTAL	735	738	572
JAN	FEB	MAR	

Source: Official records of 2d Marine Division, Camp Lejeune, N.C.

TABLE IV

2d MARINE DIVISION, CAMP LEJEUNE, N.C.

ADMIN DISCHARGES BY TYPE

CY 1976	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
UNUIT	20	10	9	3	11	1	8	9	8	6	2	6
MISOON	25	24	37	10	51	19	28	20	20	16	5	17
GOS	272	286	334	164	253	171	293	180	95	165	110	99
COG	4	5	3	3	4	5	7	4	4	5	7	5
EXPED	120	146	124	107	93	76	26	42	23	21	8	16
TOTAL	441	471	507	287	412	272	362	255	150	213	132	143
CY 1977	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
UNUIT	6	2	8	10	1	13	7	5	10	17	7	22
MISOON	24	24	21	16	7	15	11	27	24	19	12	15
GOS	47	61	77	79	66	66	52	55	55	87	77	52
COG	2	3	8	4	5	4	4	3	6	7	7	7
EXPED	14	6	6	9	24	14	7	12	10	69	39	30
TOTAL	93	96	120	118	103	112	81	102	105	199	142	126
CY 1978	JAN	FEB	MAR									
UNUIT	20	12	25									
MISOON	13	22	26									
GOS	49	81	94									
COG	15	13	6									
EXPED	34	46	62									
TOTAL	131	174	213									

Source: Official records of 2d Marine Division, Camp Lejeune, N.C.

now has the right to consult with counsel before he elects to accept the summary court-martial. If not aboard ship,¹¹ he also has the same right as to nonjudicial punishment. A recent decision of the U.S. Court of Military Appeals precludes the use of a summary court-martial except for purely military offenses.¹²

Should the accused be referred to trial by special or general court-martial for an offense punishable by a punitive discharge, the accused can initiate a request to be discharged under less than honorable conditions in order to escape trial by court-martial. Should the convening authority approve the request, the accused will be so discharged.¹³

One might argue that not all administrative discharges should be grouped in with military justice matters. However, such an argument is not well founded. Although it is realized that some administrative discharges are not connected with discipline at all, most, including those for overweight, are connected with discipline either directly or indirectly. For example, it is a criminal offense for a serviceman to refuse or fail through gross negligence to lose weight. However, the physiological and psychological factors involved in dieting make such an "offense" exceedingly costly to prove. Moreover, even if the commander was willing to undergo the expense of prosecuting overweight incidents as criminal cases, a serviceman's rights under

article 31 of the U.C.M.J., make it most difficult for the government to get the medical data needed for a conviction admitted into evidence during any criminal proceedings.¹⁴

Most commanders, therefore, choose the administrative discharge route as the more practical approach.¹⁵

In summary, the line officer should insist that all analyses of military justice factors include a study of all his options -- not just courts-martial and nonjudicial punishments. This would include a study of all administrative discharges other than those specifically reserved for trainees with less than six months of active duty.

CHAPTER VI

MILITARY ACCUSED'S RIGHTS BEFORE NONJUDICIAL PUNISHMENT AND SUMMARY COURT-MARTIAL PROCEEDINGS

Although the Supreme Court has ruled, in effect, that nonjudicial punishment and summary court-martial proceedings are not criminal proceedings such as are special courts-martial, the accused is still entitled to certain due-process rights.¹ The military accused, however, is presently afforded other rights many of which are not constitutionally protected, as the following partial lists of rights for an accused in the U.S. Navy reflect.²

NONJUDICIAL PUNISHMENT

<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u> *
Notice	MCM, 1969 (Rev.), para. 133b(2) Middendorf v. Henry, 425 U.S. 25 (1976) Morrissey v. Brewer, 408 U.S. 471 (1972) Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
Disclosure of evidence against the accused	MCM, 1969 (Rev.), para. 133b(5) Middendorf v. Henry, 425 U.S. 25 (1976) Morrissey v. Brewer, 408 U.S. 471 (1972) Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES

* This phrase, as used in this and the next chapter, means: Do the minimum requirements of the Constitution, as presently interpreted by the Supreme Court, require this right to be afforded a serviceman?

<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u>
Opportunity to be heard in person	MCM, 1969 (Rev.), para. 133b(1); Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
Right to present witnesses or documentary evidence	MCM, 1969 (Rev.), para. 133b; Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
If not embarked aboard ship, the right to refuse nonjudicial punishment	U.C.M.J. art. 15a	NO
The right to consult with counsel prior to electing to accept or refuse NJP	United States v. Booker, 3 M.J. 443 (C.M.A. 1977)	NO
The conduct accused of must be a violation of the UCMJ	MCM, 1969 (Rev.), para. 133a	NO
To have his rights under Article 31b, UCMJ explained	MCM, 1969 (Rev.), para. 133b(3)	NO
Full opportunity to present matters in extenuation and mitigation	MCM, 1969 (Rev.), para. 133b(6)	NO
To be accompanied to the hearing by a personal representative	JAGMAN, sec. 0101d	NO
The right to a hearing open to the public if so requested	JAGMAN, sec. 0101d(2)	NO

<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u>
If punishment is imposed, the right to be informed of his right to appeal	MCM, 1969 (Rev.), para. 133b	NO
The right to appeal to superior authority of the officer who imposed punishment	MCM, 1969 (Rev.), para. 135	NO
The right to petition the Board of Correction of Naval Records to correct any error or injustice in the nonjudicial punishment	10 U.S.C. 1552 (1946)	NO
The right to have punishment involving restriction on freedom of movement held in abeyance pending results of appeal to superior authority	JAGMAN, sec. 0101e(2)	NO
The right to have a military lawyer examine appeal and advise superior authority as to legality of punishment and validity of appeal	U.C.M.J. art. 15(e)	NO

SUMMARY COURTS-MARTIAL

Notice	U.C.M.J. art. 30b; Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
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<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u>
Opportunity to be heard in person	MCM, 1969 (Rev.), para. 79; Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
Right to present witnesses and documentary evidence	MCM, 1969 (Rev.), para. 79d(3); Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
Right to confront and cross examine adverse witnesses	MCM, 1969 (Rev.), para. 79d(3); Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408, U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
A neutral and detached hearing body	MCM, 1969 (Rev.), para. 79a ; Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)	YES
Written notice of the evidence and evidence relied upon	MCM, 1969 (Rev.), para. 79d ; Middendorf v. Henry, 425 U.S. 25 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); JAGMAN , sec 0120d, re- quires in all not guilty cases that the	YES

<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u>
	evidence be summarized, a copy of this record goes in the accused's Service Record Book, but there is no requirement to personally serve a copy on the accused.	
To be tried on sworn charges	U.C.M.J. art. 30	NO
Right to refuse to be tried by summary court	U.C.M.J. art. 20	NO
The right to consult with counsel prior to electing to accept or refuse a summary court	United States v. Booker, 3 M.J. 443 (C.M.A. 1977)	NO
The right to be represented by a civilian attorney if provided by the accused	United States v. Alderman, 22 C.M.A. 296, 46 C.M.R. 298 (1973) United States v. Booker, 3 M.J. 443 (C.M.A. 1977) did not mention <u>Alderman</u> but generally overruled the decision. However, to exclude counsel might be ruled a violation of due process.	
The aid of the summary court officer in cross examination of witnesses	MCM, 1969 (Rev.), para. 79d(3)	NO
The right to have his guilt determined beyond a reasonable doubt	MCM, 1969 (Rev.), para. 74a(3)	NO
The right to have civilian witnesses subpoenaed or military witnesses provided at government expense	U.C.M.J. art. 46; MCM, 1969 (Rev.) para. 79b	NO

<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u>
The assistance of the summary court in obtaining evidence	MCM, 1969 (Rev.), para. 79d(1)	NO
The same rules of evidence applicable to general and special courts-martial apply at a summary court	MCM, 1969 (Rev.), para. 137. There is a good possibility that Fourth Amendment rights against unreasonable searches and Fifth amendment rights against self incrimination would be required by due process.	NO
The right to present matters in extenuation and mitigation	MCM, 1969 (Rev.), para. 79d(4)	NO
The right to make an unsworn statement in extenuation and mitigation	MCM, 1969 (Rev.), para. 79d(4)	NO
Should the accused be convicted, he has the right of automatic review by the convening authority	MCM, 1969 (Rev.), para. 84a	NO
Should the convening authority approve any portion of the findings and sentence, the accused has the right to automatic review by the officer exercising supervisory power. Prior to his action, the supervisory authority must submit the record to a judge advocate for review	U.C.M.J. art.65(c); MCM, 1969 (Rev.), para.94a(2)	NO

<u>Accused's Rights</u>	<u>Source</u>	<u>Constitutionally Protected?</u>
The right to petition the Board of Correction of Naval Records to correct any error or injustice in the summary court martial	10 U.S.C. 1552 (1946)	NO
The right to be tried by summary court-martial only for military-type offenses if accused elects to be tried at all	United States v. Booker, 3 M.J. 443 (C.M.A. 1977)	NO

CHAPTER VII

RIGHTS OF MILITARY ACCUSED BEFORE SPECIAL AND GENERAL COURTS-MARTIAL

Since special and general courts-martial are criminal proceedings, the military accused before such a proceeding is entitled to greater rights than he is before noncriminal proceedings. Most of the rights have been legislatively determined and set forth in the Uniform Code of Military Justice.¹ However, as Chapter IV discussed, many rights emanate from sources separate and apart from the Code.² Some are constitutionally protected. Others are not. The following partial list of rights of an accused in the U.S. Navy shows the source of these rights and whether they are constitutionally protected.³

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
(Generally)		
The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.	Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976)	NO
(Investigative Stage)		
If a suspect and in custody, he must be informed of rights against self-incrimination and rights to counsel.	Fifth Amendment; Miranda v. Arizona 384 U.S. 436 (1966); U.S. v. Tempia 16 C.M.A. 629, 37 C.M.R. 249 (1967)	YES

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Investigative Stage)</u>		
If a suspect, he must be informed of Article 31 U.C.M.J. rights prior to any interrogation.	U.C.M.J. art. 31.	NO
Right to consult with a military lawyer at no expense to the individual prior to electing to make a statement.	Fifth Amendment; Miranda v. Arizona 384 U.S. 436(1966) U.S. v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249(1967)	YES (If unable to afford)
The right to have a military lawyer present with him at any interrogation. This lawyer is provided at no expense to the individual.	Fifth Amendment; Miranda v. Arizona 384 U.S. 436(1966) U.S. v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249(1967)	YES (If unable to afford)
Right to have a military lawyer present at a lineup in which the accused takes part at government expense if line up occurs after critical stage of proceedings such as, after formal charges have been served on the accused.	Fifth Amendment; Sixth Amendment U.S. v. Wade, 388 U.S. 218(1967); Gilbert v. California, 388 U.S. 263(1967); Stovall v. Denno, 388 U.S. 293 (1967)	YES (If unable to afford)
Right to have a military lawyer present at any line up in which the accused takes part at government expense regardless of the stage of the proceedings.	MCM, 1969 (Rev.) para. 153a	NO
The interrogation of a suspect who already has a lawyer is automatically illegal despite the Supreme Court's disavowal of such an automatic rule.	U.S. v. McOmber, 1 M.J. 380(C.M.A. 1976) U.C.M.J., art. 31	No

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Investigative Stage)</u>		
Despite a 1972 Supreme Court Case which permitted such, the harmless error rule will not be applied to a violation of a military accused's rights against self-incrimination and a violation of Article 31, U.C.M.J. is automatically prejudicial error.	U.S. v. Hall, 1 M.J. 162 (C.M.A. 1975)	NO
Protected against unreasonable searches (generally).	Fourth Amendment; MCM, 1969, (Rev.), para. 152	YES
Evidence resulting from a search of a serviceman overseas in a foreign country is inadmissible at a court-martial if it doesn't comply with the Fourth Amendment; or it doesn't comply with local foreign law; or it shocks the conscience.	U.S. v. Jordan, 1 M.J. 334 (C.M.A. 1976)	
Right to have contraband seized as a result of a gate search not be admitted in evidence against him if search was a "random" gate search of all <u>vans</u> exiting the base which authorities believed might contain stolen motorcycles.	U.S. v. Chase 1 M.J. 275 (C.M.A. 1976)	NO
Right to have contraband seized as a result of a "shakedown inspection" not be admitted in evidence against him if it resulted from walking marijuana detection dogs through living areas in a barracks looking for <u>possible</u> marijuana (walk through was not based on actual probable cause).	U.S. v. Roberts 2 M.J. 31 (C.M.A. 1976)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Investigative Stage)</u>		
An accused cannot be forced to speak for voice identification purposes, although the Supreme Court has ruled that such is permissible under the Fifth Amendment.	U.S. v. Mewborn, 17 C.M.A. 431, 38 C.M.R. 229(1968); U.C.M.J. art. 31(b)	NO
An accused cannot be forced to furnish a handwriting exemplar, although the Supreme Court has ruled that such is permissible under the Fifth Amendment.	U.S. v. White, 17 C.M.A. 211, 38 C.M.R. 9(1967); U.C.M.J. art. 31(b)	NO
An accused cannot be forced to submit to a blood alcohol test, although the Supreme Court has ruled that such is permissible under the Fifth Amendment.	U.S. v. MusGuire, 9 C.M.A. 67, 25 C.M.R. 329(1958); U.C.M.J. art. 31(b)	NO
An accused cannot be forced to give a urine sample for criminal prosecution purposes, although the Supreme Court has ruled that such is permissible under the Fifth Amendment.	U.S. v. McClung, 11 C.M.A. 754, 29 C.M.R. 570(1960); U.C.M.J. art. 31(b)	NO
A superior must warn an accused of his rights against self-incrimination if the superior is acting in an official capacity if the accused thinks the questioner is a civilian pawnbroker.	U.S. v. Souder, 11 C.M.A. 59, 28 C.M.R. 283(1959)	NO
Even if a superior is acting in a personal capacity when he questions an accused, the accused must be warned of his rights against self-incrimination under Article 31, U.C.M.J. if he is aware of the superior's position of authority.	U.S. v. Dohle, 1 M.J. 223(C.M.A. 1975)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Jurisdiction)</u>		
The military has no court-martial jurisdiction to try a serviceman who fraudulently enlisted with the assistance of a recruiter.	U.S. v. Russo, 1 M.J. 134 (C.M.A. 1975)	NO
The service connection test espoused by the U.S. Supreme Court in O'Callahan v. Parker and Relford v. Commandant will be strictly construed. Thus, off-base use of drugs by a serviceman is not automatically triable by military tribunals nor are cases where all of the parties are servicemen.	U.S. v. McCarthy, 2 M.J. 26 (C.M.A. 1976); U.S. v. Alef, 3 M.J. 414 (C.M.A. 1977); U.S. v. Hedlund, 2 M.J. 11 (C.M.A. 1977)	NO
Decisions of the various Courts of Military Review holding, in effect, drugs automatically impact adversely on the ability of the user to perform his military duties are not to be followed.	U.S. v. Alef 3 M.J. 414 (C.M.A. 1977)	NO
<u>(Pretrial Confinement)</u>		
The accused may challenge the decision to confine him by filing a petition under Article 138 (or by writ of habeas corpus to the Court of Military Appeals (COMA)).	U.C.M.J. art. 138; 28 U.S.C. 1651 (a) (1948); Catlow v. Cooksey, 21 C.M.A. 106, 44 C.M.R. 160 (1971); Porter v. Rocharadson, 50 C.M.R. 910 (C.M.A. 1975)	NO
Accused's pretrial confinement must be reviewed by a neutral and detached magistrate who cannot be the convening authority.	Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976)	NO
If an accused is being held for a GCM, the charges and investigation or the reason for the delay must be forwarded within 8 days.	U.C.M.J. art. 33	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Pretrial Confinement)</u>		
Can only be placed into pre-trial confinement to ensure his presence at trial or to prevent future foreseeable serious criminal misconduct.	U.C.M.J. art.13; Fletcher v. Commanding Officer 2 M.J.234 (C.M.A. 1976); U.S. v. Heard, 3 M.J. 14 (C.M.A. 1977)	NO
Must be taken within a reasonable time before a neutral magistrate, who is not the confined's commanding officer.	SECNAV NOTE 5810 of 15 Oct 76;	NO
Must inform accused within 48 hours of his right to confer with counsel.	JAGMAN, 0151	NO
Placing the accused in pre-trial confinement must be a stepped process with efforts at lesser forms of restraint tried first.	U.S. v. Heard, 3 M.J.14 (C.M.A.1977)	NO
<u>(Discovery)</u>		
Has equal access with TC to obtain witnesses and evidence.	U.C.M.J. art. 46	NO
Defense Counsel without resort to process can examine all evidence in the hands of military authorities.	MCM, 1969 (Rev.), para.115	NO
The right to be present with counsel at the taking of any deposition.	MCM, 1969 (Rev.), para.117b(2)	NO
The right to be transported to the place where the deposition is taken at government's expense.	MCM, 1969 (Rev.), para.117b(2)	NO

ACCUSED'S RIGHTSOURCECONSTITUTIONALLY
PROTECTED?(Article 32 Hearings)

The government must exert all reasonable effort to secure the voluntary attendance of non-military witnesses for the defense at an Article 32 (b) hearing regardless of the distance of the witness and the costs involved.	U.S. v. Ledbetter, 2 M.J.37 (C.M.A. 1976) U.C.M.J. art. 32	NO
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(Pretrial Advice Letter-GCM Cases Only)

Staff Judge Advocate advice to CA must be thorough and the CA must refer a GCM case to his SJA for his advice prior to referral to trial	U.C.M.J. art. 34; MCM, 1969 (Rev.), para, 34e	NO
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(Article 32 Hearing-GCM Cases Only)

Must be advised of the charge being investigated.	U.C.M.J. art. 32	NO
Entitled to appointed military counsel at government expense whether or not accused is indigent.	U.C.M.J. art. 32	NO
May be represented at the investigation by a civilian lawyer if provided by him.	U.C.M.J. art. 32	NO
May request a military lawyer of his own selection if reasonably available. If available, such lawyer is provided at government expense.	U.C.M.J. art. 32	NO
At the investigation, the accused has an opportunity to fully cross examine all witnesses who are available.	U.C.M.J. art. 32	NO
May present any matter on his own behalf either in defense or mitigation.	U.C.M.J. art. 32	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Article 32 Hearing-GCM Cases Only)</u>		
All witnesses are provided at government expense.	U.C.M.J. art. 32	NO
May make a statement in any form.	U.C.M.J. art. 32	NO
For all practical purposes, the government must produce a military witness for defense at an Article 32(b) hearing, regardless of the cost and mere inconvenience to the commands involved and the distant location of the witness.	U.S. v. Ledbetter, 2 M.J. 37 (C.M.A. 1976) U.C.M.J. art. 32	NO
If the charges are forwarded, the accused is entitled to a copy of the investigation.	U.C.M.J. art. 32	NO
<u>(Speedy Trial)</u>		
Right to a speedy trial.	Sixth Amendment	YES
There is a presumption of the lack of a speedy trial after 90 days of pretrial confinement.	U.S. v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971); U.S. v. Driver, 23 C.M.A. 243, 49 C.M.R. 376 (1974)	NO
The failure of a critical witness to get a passport to travel from the United States to the situs of a trial in Germany will not, automatically, toll the 90-day Burton rule.	U.S. v. Dinkins 1 M.J. 185 (C.M.A. 1975)	NO
The requested delay of a co-accused at a joint Article 32(b) hearing will not, automatically, toll the 90-day Burton rule.	U.S. v. Johnson, 1 M.J. 294 (C.M.A. 1976)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Speedy Trial)</u>		
Neither the seriousness of a murder case nor the foreign situs of its disposition will justify, per se, a greater length of speedy trial than the 90 days espoused in the Burton rule.	U.S. v. Beach, 1 M.J. 118 (C.M.A. 1975)	NO
A 1000-page trial, a 191 page SJA review is not automatically evidence of a complex case for either speedy trial or review purposes.	U.S. v. Larsen 1 M.J. 300 (C.M.A. 1975)	NO
The unavailability of a military judge will not, per se, toll the 90-day Burton rule.	U.S. v. McClain 1 M.J. 60 (C.M.A. 1975)	NO
<u>(Charging the Accused)</u>		
Charges and specifications must be signed by a person under oath.	U.C.M.J. art. 30	NO
The facts upon which the Government relies to support jurisdiction must be alleged in the sworn charges and proved at trial.	U.S. v. Alef, 3 M.J. 414 (C.M.A. 1977)	NO
It is not illegal for an NCO to loan money to a recruit for profit despite a Navy regulation to the contrary.	U.S. v. Smith, 1 M.J. 156 (C.M.A. 1975)	NO
Multiplicitious charging will be scrutinized closely by the U.S. Court of Military Appeals to see if it was used solely as a vehicle to encourage stiffer sentences.	U.S. v. Hughes, 1 M.J. 346 (C.M.A. 1976)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
(Trial)		
May not be brought to trial until (3 days SPCM) (5 days GCM) after service of charges.	U.C.M.J. art. 35	NO
Right to request to be tried before military judge alone.	U.C.M.J. art. 39; MCM, 1969 (Rev.), para. 61g	NO
Right to have case reversed on review if request for military judge was not in writing.	U.C.M.J. art. 39; MCM, 1969 (Rev.), para. 61g U.S. v. Dean 20 C.M.A. 212 43 C.M.R. 52 (1970)	NO
Right to have court-martial composition fully explained by the military judge.	MCM, 1969 (Rev.), paras. (2) 4 (c); 53 (d); 74 (d); and 76 (b)	NO
Right to have case reversed on review if request for enlisted membership was not in writing.	U.C.M.J. art. 25c (1); U.S. v. White, 21 C.M.A. 583, 45 C.M.R. 357 (1972)	NO
Right to challenge members and/or military judge.	U.C.M.J. art. 41	NO
Right to have his rights to counsel fully explained by the military judge.	U.C.M.J. art. 38 (b)	NO
Right to be represented by counsel.	Argersinger v. Hamlin, 407 U.S. 25 (1972)	YES
Right to be represented by detailed military counsel and/or individual military counsel if reasonably available and/or a civilian lawyer.	U.C.M.J. art. 38; U.S. v. Cutting 14 C.M.A. 347, 34 C.M.R. 127 (1964)	NO
A convening authority may not reverse any ruling of the military judge despite para. 67 of the MCM.	U.S. v. Ware, 1 M.J. 282 (C.M.A. 1976)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
(Trial)		
No representative of the government, including the convening authority, the Staff Judge Advocate, or the Judge Advocate General may talk to a military judge about a sentence he imposed.	U.S. v. Ledbetter 2 M.J.37 (C.M.A. 1976)	NO
A military judge should not preside over a case but should disqualify himself, if the accused wants, once he rejects a guilty plea as being improvident and enters a not guilty plea in behalf of the accused.	U.S. v. Schackelford 2 M.J.17 (C.M.A. 1976) U.S. v. Cockerell 49 C.M.R.567 (A.C.M.R.1974)	NO
The Courts of Military Review have extraordinary writ power and can exercise power over a command without waiting for the case to come to them for review.	Kelly v. U.S. 1 M.J.172 (C.M.A. 1975)	NO
Evidence not specifically admitted during the merits of the case, such as the minor age of a child victim, may not be considered against an accused by the Courts of Military Review.	U.S. v. Starr, 1 M.J.186 (C.M.A. 1975) U.S. v. Boland, 1 M.J.241 (C.M.A. 1975)	NO
Despite Article 67 of the UCMJ, the Court of Military Appeals cannot be precluded from issuing grants of extraordinary relief in cases that could never otherwise come before it, (such as summary courts-martial, non-judicial punishment, and administrative discharge proceedings).	McPhail v. U.S. 1 M.J. 457 (C.M.A.1976); All Writs ACT, 28 USC 1651 (a) (1948) U.S. v. Thomas, 1 M.J.397 (C.M.A. 1976)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
(Trial)		
For all practical purposes, right to have <u>all three</u> types of counsel detailed; individually requested (if available), and civilian. Detailed and individual counsel to be provided at government expense.	U.C.M.J. art. 38 U.S. v. Quinones, 1 M.J.64(C.M.A. 1975)	NO
Right to appeal refusal of request for individual military counsel to refusing officer's superior.	U.C.M.J. art. 38 MCM, 1969 (Rev.) para. 48	NO
Right to litigate issue and, in effect, have government prove at trial that individually requested counsel was, in fact, not reasonably available.	U.C.M.J. art. 38	NO
Punishment for the simultaneous possession of a number of kinds of drugs can be no greater than it would be if the accused possessed only one kind of drug.	U.S. v. Hughes, 1 M.J.346(C.M.A. 1976)	NO
Trial Counsel cannot argue general deterrence to increase the severity of a sentence beyond that which would otherwise be adjudged.	U.S. v. Mosely, 1 M.J.350(C.M.A. 1976)	NO
Regardless of whether there has been harmless error or substantial compliance, it is reversible error for the military judge not to ascertain from the defense counsel that a written pretrial agreement, encompassing all of the understandings of the parties, exists and is clearly understood by all considered.	U.S. v. King, 3 M.J. 458(C.M.A. 1977)	NO

ACCUSED'S RIGHTSOURCECONSTITUTIONALLY
PROTECTED?(Trial)

For all practical purposes, the right to have case reversed on review if court finds plea of guilty was based on a pretrial agreement that called for <u>any</u> action other than a reduction in sentence or the dropping of charges in exchange for the plea of guilty.	U.S. v. Holland, 1 M.J.58(C.M.A. 1975)	NO
For all practical purposes, an accused has an absolute right to the personal appearance of any material witness even if military necessity makes it critical that he be elsewhere and even if the expense and inconvenience to the command would be great.	U.S. v. Carpenter, 1 M.J.384(C.M.A. 1976); U.C.M.J. art. 46 U.S. v. Williams, 3 M.J.239(C.M.A. 1977)	NO
For all practical purposes, an accused has a right to any military witness to testify in extenuation and mitigation regardless of that military witness' location and, in peacetime at least, regardless of his duties.	U.S. v. Williams, 3 M.J.239(C.M.A. 1977) U.S. v. Willis, 3 M.J.94(C.M.A. 1977)	NO
Right to plead NG even if he is guilty.	Crain v. United States 162 U.S. 625 (1896)	YES
Strictly construed right to have case reversed on review if plea of guilty is, in <u>any</u> material way, inconsistent with any evidence or statements he may present during the trial.	U.C.M.J. art. 45; U.S. v. Care 18 C.M.A. 535, 40 C.M.R. 247 (1969) U.S. v. Jemmings, 1 M.J.414(C.M.A. 1976)	NO
Right to present evidence on the merits and in "E&M."	Sixth Amendment	YES
Right to confront and cross examine witness.	Sixth Amendment	YES
Right to be acquitted unless found guilty beyond a reasonable doubt.	Holt v. United States 218 U.S. 245 (1910)	YES

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Post-Trial)</u>		
Right to have the CA take initial action on his case.	U.C.M.J. art. 60	NO
Right to have case reviewed and approved by officer exercising general court-martial jurisdiction.	U.C.M.J. art. 65(b)	NO
In GCM, or SPCM w/BCD, right to have case referred to SJA for written advice.	U.C.M.J. art. 61 65(b)	NO
Right to view and comment on written SJA review, provided for above.	U.S. v. Goode, 1 M.J. 3(C.M.A. 1975)	NO
Automatic right to receive copy of ROT of SPCM/GCM, or to have record served on counsel.	U.C.M.J. art. 54(c); U.S. v. Cruz-Rijos, 1 M.J.429(C.M.A. 1976)	NO
Automatic right to a verbatim record of trial, if sentence includes a BCD of confinement in excess of six months.	U.C.M.J. art. 64(c)	NO
Automatic review of all courts-martial by convening authority.	U.C.M.J. arts. 60,61, 64, 65,	NO
Right to speedy review within 90 days of case by CA and SA.	Dunlap v. Convening Authority 23 C.M.A. 135, 48 C.M.R. 751(1974); U.S. v. Brewer, 1 M.J. 233(C.M.A.1975)	NO
Right to a strict construction of the 90 day speedy review and a dismissal of the case if the "rule" is found to have been violated.	Bouler v. U.S, 1 M.J.299(C.M.A. 1976); U.S. v. Larsen, 1 M.J. 300(C.M.A. 1975	NO
In the future, if too many commands release their convicted accused from confinement on the last minute(e.g. 88th day) to escape the 90 day Dunlap rule,such a pattern will result in a dismissal of the case by the Court of Military Appeals.	U.S. v. Ledbetter, 2 M.J.37(C.M.A. 1976); U.S. v. Burns, 2 M.J.78(C.M.A. 1976)	NO

<u>ACCUSED'S RIGHT</u>	<u>SOURCE</u>	<u>CONSTITUTIONALLY PROTECTED?</u>
<u>(Post-Trial)</u>		
Right to request deferment of sentence to confinement.	U.C.M.J. art. 57(d)	NO
Right to petition BCNR.	10 U.S.C. 1552(1946)	
If GCM sentence or SPCM sentence w/BCD has been suspended, right to formal hearing prior to vacating that suspension while accompanied by counsel.	U.C.M.J. art. 72(a)	NO
Right to have entire vacation proceedings heard before convening authority.	U.C.M.J. art. 72(a); U.S. v. Bingham, 3 M.J. 119 (C.M.A. 1977)	NO
Right to have sentence which includes a BCD reviewed by CMR before it can be executed.	U.C.M.J. arts. 67(b) and 71(c)	NO
Right to petition JAG for relief before review by CMR.	U.C.M.J. art. 69	NO
The right to petition COMA in cases involving BCD, DD or CHL x 1 yr.	U.C.M.J. art. 67(c)	NO

CHAPTER VIII

MILITARY RESPONDENT'S RIGHTS WITH RESPECT TO ADMINISTRATIVE DISCHARGE PROCEEDINGS

The Supreme Court has never ruled specifically as to what rights, if any, a military respondent pending administrative discharge must be accorded.¹ However, legal writers usually contend that a respondent is entitled to the same due process rights applicable to nonjudicial punishments and summary court-martials.² Even if such an assertion is true, it still must be remembered that the rights of a respondent will depend also on the nature of the discharge.³ Authorities have recognized the stigma of a Discharge Under Other Than Honorable Conditions (OTHHC).⁴ The adverse effects of an OTHHC discharge coupled with their increased number in recent years (as compared to punitive-type discharges) have prompted Congressional hearings on the subject.⁵ The Department of Defense has also expressed concern as to what safeguards would be adequate.⁶ This concern may account for the increased protection accorded military respondents during the past decade.⁷

The rights that a serviceman has, with respect to a pending administrative discharge, depends not only on the type of discharge anticipated, but also on the duration of

his service and his branch of service.⁸ Appendix XXV sets out and discusses these rights with respect to Navy and Marine Corps personnel (the rights of respondents in the other services are somewhat similar).

The author of this report did not, while doing the research on which this report is based, encounter any complaints with respect to the cost of administrative discharge proceedings.⁹ While such proceedings are costly, as the next chapter will point out, they are apparently not overly costly, at least in the minds of the military leaders.

While the line officer should have a thorough understanding of the matters contained in Appendix XXV, such an understanding is presently not necessary for purposes of quantifying the military justice system. Should the Court of Military Appeals, however, assume control over administrative discharge proceedings, as the Court has implied it might,¹⁰ the rights of respondents may become ever increasingly expensive.

By retaining Appendix XXV, the Navy and Marine Corps line officer can periodically compare the rights a respondent generally has, as of 1 April 1978, with those he may have in the future. If the military leaders perceive any additional rights as being too expensive, they should immediately evaluate the costs and benefits of not only those rights, but also the rights listed in Appendix XXV, to see

if the cost of a newer right can be offset by the curtailment of a longer existing right. Until such a situation arises, however, he need only monitor the situation.

CHAPTER IX

COSTING THE SYSTEM

During the month of January 1977, an audit team from the Norfolk, Virginia Regional Office of the Washington, D.C.-based U.S. General Accounting Office (GAO), completed interviews of some 400 officers and enlisted personnel assigned to the 2d Marine Division, Camp Lejeune, N.C.¹ During these interviews, the question was asked: how much time do you spend on processing and/or reviewing administrative discharges, nonjudicial punishments, summary courts-martial, special courts-martial and general courts-martial?² The results³ of these interviews are shown in Table V. Although the office of the GAO apparently does not intend to use these figures,⁴ they can be used to prove that a "price tag on justice" can be established.⁵

By using the formula set out in Table VI, the salary costs shown in Table VII, and the January 1977 case disposition amounts in Tables II and IV, one can establish a cost for each type of case disposition. Table VIII indicates the approximate costs per case disposition during January 1977 for the 2d Marine Division were:

Administrative Discharge	\$567.00
NJP	90.00
SCM	378.00
SPCM	832.00
GCM	4,567.00

TABLE V

AVERAGE NUMBER OF MANMONTHS, BY GRADE,
SPENT IN THE 2d MARINE DIVISION, CAMP LEJEUNE,
N.C., ON MILITARY JUSTICE MATTERS
DURING THE MONTH OF JANUARY, 1977

Grade	Admin Discharge Man-Months	NJP Man- Months	SCM Man- Months	SPCM Man- Months	GCM Man- Months	No. of Men	TOTAL Man- Months
01	.35	.27	.27	.46	.05	3	1.40
02	8.61	4.74	3.05	11.29	.90	66	28.59
03	4.47	5.15	2.50	9.76	1.84	68	23.72
04	1.36	.60	.32	4.25	1.02	14	7.55
05	1.33	1.62	.88	2.39	.75	18	6.97
06	.54	.19	.05	.21	.45	6	6.44
07	.00	.00	.00	.00	.00	0	.00
08	.15	.01	.00	.06	.03	1	.25
WO1	.18	.30	.16	.13	.03	2	.80
WO2	.08	.02	.03	.08	.00	1	.21
WO3	.18	.00	.00	.00	.00	2	.18
WO4	.00	.00	.00	.00	.00	0	.00
E-1	.05	.36	.02	.01	.00	3	.44
E-2	2.88	3.75	1.11	1.83	.28	17	9.85
E-3	7.30	7.42	2.34	8.93	1.01	55	27.08
E-4	3.70	7.80	2.73	8.15	.95	51	23.33
E-5	7.32	3.19	.84	1.33	.07	33	12.75
E-6	1.19	.28	.41	2.04	.37	7	4.29
E-7	.88	.84	.19	.97	.75	9	3.63
E-8	3.11	8.02	.44	1.97	.31	42	13.85
E-9	.00	.35	.00	.00	.00	2	.35
TOTAL	43.69	44.91	15.34	53.86	8.89	400	166.68

*Only 71 of 87 companies were available for interview.
Source: Figures based on statistics from unpublished report in
author's files, compiled by the U.S. GAO, Norfolk, VA during
January 1977.

TABLE VI

FORMULAS FOR ESTABLISHING APPROXIMATE SALARY COST,
IN DOLLARS, FOR JANUARY, 1977 TO PROCESS AND REVIEW
EACH "CASE DISPOSITION" WITHIN THE
2d MARINE DIVISION, CAMP LEJEUNE, N.C.*

Admin Discharges	$S + (S \times .10) \div \text{TADs} = \text{CPAD}$
NJPs	$S + (S \times .10) \div \text{TNJPs} = \text{CPNJP}$
SCMs	$S + (S \times .10) \div \text{TSCMs} = \text{CPSCM}$
SPCMs	$S + (S \times .10) \div \text{TSPCMs} = \text{CPSPCM}$
GCMs	$S + (S \times .10) \div \text{TGCMs} = \text{CPGCM}$

Where:

S = Unadjusted Salary Cost taken from Table VII

TADs = Total Admin Discharges

TNJPs = Total NJPs for January, 1977

TSCMs = Total SCMs for January, 1977

TSPCMs = Total SPCMs for January, 1977

TGCMs = Total GCMs for January, 1977

CPAD = Cost per Admin Discharge

CPNJP = Cost per NJP

CPSCM = Cost per SCM

CPSPCM = Cost per SPCM

CPGCM = Cost per GCM

* Although 18.3% of the Division units were not available for interview, disposition figures shown in Table IV do include cases from these units. Therefore salary costs were arbitrarily increased approximately 10% to account for these units.

TABLE VII

APPROXIMATE SALARY COST, IN DOLLARS, FOR JANUARY 1977
TO PROCESS AND REVIEW MILITARY JUSTICE MATTERS WITHIN
THE 2d MARINE DIVISION, CAMP LEJEUNE, N.C.*

GRADE	Admin Discharges	NJP	SCM	SPCM	GCM
01	344	265	265	452	49
02	12,141	6,669	4,291	15,885	1,266
03	8,019	9,239	4,485	17,509	3,300
04	2,899	1,279	682	9,061	2,174
05	3,326	4,051	2,200	5,977	1,875
06	1,561	549	144	607	1,301
07	-	-	-	-	-
08	596	39	-	238	119
WO1	215	359	191	155	35
WO2	110	27	41	110	-
WO3	297	-	-	-	-
WO4	-	-	-	-	-
E-1	31	224	12	6	-
E-2	1,929	2,512	743	1,226	187
E-3	5,197	5,283	1,666	6,348	776
E-4	2,786	5,873	2,055	6,136	715
E-5	6,134	2,641	703	1,114	58
E-6	1,231	289	424	2,111	302
E-7	1,061	1,013	205	1,196	904
E-8	4,322	11,147	611	2,738	430
E-9	-	579	-	-	-
TOTAL	52,199	52,038	18,718	70,852	13,571

*Cost does not include costs for witnesses, juries, escorts, drivers, military police or personnel from ten companies and several battalion headquarters unavailable for interview.

Source: Cost computed by using average longevities for pay purposes and multiplying applicable monthly incomes (including basic allowances) times amounts shown in Table IV.

TABLE VIII

COMPUTATIONS FOR ESTABLISHING
APPROXIMATE SALARY COSTS FOR JANUARY 1977
TO PROCESS AND REVIEW EACH "CASE DISPOSITION" WITHIN
THE 2d MARINE DIVISION, CAMP LEJEUNE, N.C.*

<u>Type of Disposition</u>	<u>Salaries</u>	<u>Salary Adjustments</u>	<u># of Disposition for Month</u>	<u>Cost per Disposition</u>
Admin Discharges	52,199 +	522 ÷	93	= \$567.00
NJPs	52,038 +	520 ÷	591	= \$ 90.00
SCMs	18,718 +	187 ÷	50	= \$378.00
SPCMs	70,852 +	708 ÷	86	= \$832.00
GCMs	13,571 +	135 ÷	3	=\$4,567.00

*Dollar costs do not reflect salary costs for witnesses, accused, juries, escorts, drivers, and military police. Salaries based on FY77 salary tables.

By using the figures in Table II and the per case disposition costs in Table VIII, an approximate salary cost can be established for the entire armed services. Table IX reflects that the service-wide salary cost for the process and review of military justice matters, to include administrative discharges, on the division level, was over 129 million dollars for fiscal year 1976. This total cost does not include division level physical resource costs or salary costs for witnesses, accused, escorts, drivers, and military police.⁶ These figures also do not reflect the costs for cases after they left the division level for further review on a higher echelon level. Such costs have been estimated to be in the millions of dollars.⁷

Although one might argue that the man-hours spent on military justice matters within the 2d Marine Division were higher in January 1977 than that found elsewhere, the figures in Table X show that the lawyers in the 2d Marine Division handle more cases per attorney than most other commands. Assuming these figures apply also to the nonlawyers as well, the 2d Marine Division per case disposition costs appear to be considerably lower than those found elsewhere.⁸

TABLE IX

COMPUTATIONS FOR ESTABLISHING SALARY COSTS FOR FY 1976
TO PROCESS AND REVIEW "CASE DISPOSITIONS" WITHIN
THE ARMED SERVICES ON THE DIVISION LEVEL*

<u>Branch of Service</u>	<u>Salary Cost Per Disposition</u>		<u>No. of "Case Dispositions"</u>		<u>Total Salary Cost</u>
Admin Discharges	567	X	120,313	=	68,217,471.00
NJPs	90	X	343,286	=	30,895,740.00
SCMs	378	X	9,714	=	3,671,892.00
SPCMs	832	X	18,819	=	15,657,408.00
GCMs	4,567	X	2,339	=	<u>10,682,213.00</u>

Approximate Total Division Level Salary Costs for all FY 76 "Case Dispositions"		129,124,724.00
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* Costs computed by using cost figures in Table VIII and "Case Disposition" figures in Table II. Costs do not reflect costs on Division level for accused, witnesses, escorts, drivers, and military police. Costs, also, do not reflect costs for cases after they leave Division for further review or physical resource costs.

TABLE X

COMPARISON OF 1976 MONTHLY CASELOAD PER
COUNSEL FOR SELECTED UNITS OF THE ARMED SERVICES

Organization	Trial counsel				Defense counsel			
	Court martial		Advice to commanders on admir.		Court martial		Advice to accused on admin. discharge proceedings	
	General Special Summary Total	Art. 32	Art. 15	Art. 15	General Special Summary Total	Art. 32	Art. 15	Art. 15
MARINE CORPS								
2d Marine Div.	.2	8.1	0	8.3	.7	0	0	0
1st Marine Div.	.3	5.7	0	6.0	.4	0	.2	.2
Force Troops/2d Force								
Service Support Group	.4	4.2	0	4.6	.8	0	2.4	10.5
Marine Corps Base,								
Camp Pendleton	.7	4.6	0	5.3	7.5	0	2.4	14.8
Marine Corps Base								
Camp Lejeune	.3	2.6	0	2.9	3.2	0	0	8.4
NAVY								
NMST Norfolk	.7	6.0	0	6.7	.5	0	0	7.5
NLSD Pensacola	.4	10.3	0	10.7	.2	0	0	7.4
NLSC San Francisco	.2	5.3	0	5.5	.4	0	0	.4
ARMY								
AVH Airborne Corps								
and Fort Bragg	1.1	4.3	0	5.4	1.1	25.6	.8	26.0
321 Airborne Div.	1.5	3.9	0	5.4	1.5	107.6	0	22.0
JFK Center for								
Military Assistance	.9	1.1	0	2.0	.2	15.2	2.1	13.1
USA Infantry Center								
and Ft. Benning	.2	2.5	0	2.7	.4	0	1.5	7.5
US Army Quartermaster								
Center and Ft. Lee	.3	2.0	1.1	3.9	.3	10.9	0	20.0
AIR FORCE								
Lowry AFB	.2	.8	.1	1.1	.1	0	0	9.2
USAF Trial Judiciary,								
Fourth Circuit	1.5	0	0	1.5	0	0	0	0
Holloman AFB	0	.2	0	.2	.1	0	.3	12.0
McClanahan AFB	0	.4	0	.4	0	0	.2	4.5
Pope AFB	0	.4	0	.4	0	22.7	2.9	2.8
Williams AFB	0	0	0	0	0	0	.1	.2

Source: A proposed Appendix to a GAO Report of Investigation still in the preparation stage as of 1 June 1978. Statistics compiled by various GAO teams at sites indicated.

CHAPTER X

COSTING OUT THE CATLOW/RUSSO RIGHT

Chapter VI sets forth the so-called Catlow/Russo right as being one of these extrinsic rights presently afforded military accused.¹ This right permits the accused to escape prosecution if he can show that he was enlisted into the active service as a result of recruiter misconduct.² The accused relies on this right by making a motion to dismiss the case for lack of jurisdiction. Once the motion is made, the government must prove that the accused's enlistment did not involve recruiter misconduct or the case will be dismissed.³

As evidenced by Tables XI and XII and Appendix VIII, litigations devoted to Catlow/Russo motions continue to be a very time-consuming matter.⁴ It has been estimated that this right has been the primary cause for the increase in duration of general and special courts-martial within the Navy since 1 July 1974.⁵ As Table XIII reflects, the duration of these trials in the Navy has increased from 2.7 hours to 3.7 hours (an increase of 37%), despite the fact that the percentage of jury trials has remained fairly constant.⁶

TABLE XI

STATISTICS REFLECTING NUMBER OF CATLOW-RUSSO MOTIONS
MADE DURING SPCMs FOR THE PERIOD 1May77-30Apr78
WITHIN THE NAVY-MARINE CORPS TRIAL JUDICIARY,
SOUTHWEST JUDICIAL CIRCUIT NAVAL STATION, SAN DIEGO, CA.*

<u>Month</u>	<u>No. of SPCMs Tried</u>	<u>No. of Motions Litigated</u>	<u>No. of Motions Granted</u>	<u>Percent of Motions Denied</u>
May 77	49	3	1	66
Jun 77	51	3	1	66
Jul 77	64	4	2	50
Aug 77	43	3	0	100
Sep 77	71	3	1	66
Oct 77	45	2	0	100
Nov 77	50	4	3	25
Dec 77	56	3	2	33
Jan 78	75	7	2	71
Feb 78	79	30	25	17
Mar 78	80	14	7	50
Apr 78	<u>73</u>	<u>12</u>	<u>3</u>	75
TOTAL	736	88	47	

Source: Compiled from statistics in author's files
furnished by Circuit Military Judge Robert M. Redding,
Records of Navy-Marine Corps Trial Judiciary, Southwest
Judicial Circuit, Naval Station, San Diego, CA. 92136

TABLE XII

STATISTICS COMPARING NUMBER OF CATLOW-RUSSO MOTIONS
MADE DURING SPCMs FOR THE PERIOD 1Jan77-31Mar78
WITHIN THE 2d MARINE DIVISION, CAMP LEJEUNE, N.C. WITH
THE NUMBER OF EXPEDITIOUS DISCHARGES FOR THAT DIVISION

<u>Month</u>	<u>No. of SPCMs Tried</u>	<u>No. of Motions Litigated</u>	<u>No. of Expeditious Discharges</u>	<u>Percent of Motions Denied</u>
Jan 77	86	5	14	40
Feb 77	94	4	6	25
Mar 77	106	5	6	40
Apr 77	67	6	9	50
May 77	59	10	24	30
Jun 77	53	5	14	80
Jul 77	63	11	7	55
Aug 77	81	8	12	38
Sep 77	73	5	10	60
Oct 77	52	8	69	38
Nov 77	58	3	39	33
Dec 77	62	10	30	30
Jan 78	50	1	34	100
Feb 78	55	4	46	25
Mar 78	50	2	62	00

Source: Compiled from statistics in author's files
furnished by the Office of the Staff Judge Advocate, 2d Marine
Division, Camp Lejeune, N.C., on 19 April 1977.

TABLE XIII

AVERAGE IN-COURT TIME PER GCM/SPCM DURING PERIOD
1JUL74-31MAR78 FOR MILITARY JUDGES ASSIGNED
TO NAVY-MARINE CORPS TRIAL JUDICIARY*

<u>Period</u>	<u>No. of Cases</u>	<u>% MBR Cases</u>	<u>Average Hrs. In-Court Per Case</u>	<u>Increase Compared to 1Jul-31Dec75 Period</u>
1Jul-31Dec74#	3,034	.109	2.70	00 minutes
1Jan-30Jun75	3,579	.157	3.19	29 minutes
1Jul-31Dec75#	2,961	.133	3.27	34 minutes
1Jan-30Jun76	2,850	.115	3.78	65 minutes
1Oct76-31Mar77	2,768	.106	3.53	50 minutes
1Apr77-30Sep77	2,491	.131	3.80	66 minutes
1Oct77-31Mar78	2,554	.099	3.70	60 minutes

* Navy SPCM military judges joined judiciary activity on 1 July 1974. Figures include GCMs for Marine Corps but not SPCMs. Such statistics not available for SPCMs tried by Marine Corps commands.

U.S. v. Catlow, 23 U.S.C.M.A. 142, 48 CMR 758, decided 1Jun74, U.S. v. Russo, 1 M.J. 134, decided 1Aug75.

Source: Compiled from statistics, in author's files, provided by Officer-in-Charge, Navy-Marine Corps Trial Judiciary, Washington, DC 20374.

Can this increased court duration in the Navy be measured in dollars? Can the Navy's experience be extrapolated to the other services? The author believes the answer to both questions is yes. However, two assumptions must be made, since the author could find no meaningful statistics being kept anywhere on this subject other than that already discussed above. First, it must be assumed that other services have also experienced an increased court duration similar to the Navy's. Second, it must be assumed that this increased duration for all services was caused primarily by the Catlow/Russo motions. (The accuracy of these assumptions could easily be verified by appropriate record-keeping).

By multiplying the rate of increase (37%) by the cost of a court-martial (GCM \$4,567 - SPCM \$832), we can establish the "Catlow/Russo" right as costing the government approximately \$1,690 for each general court-martial and \$308 for each special court-martial. Thus, for fiscal year 1976, on the division level, this right cost the U.S. Marine Corps close to two and a half million dollars and the armed services, as a whole, nearly ten million dollars.

CHAPTER XI

COSTING OUT THE RIGHT TO CONSULT WITH COUNSEL PRIOR TO ELECTING WHETHER TO ACCEPT NONJUDICIAL PUNISHMENT OR TRIAL BY SUMMARY COURT-MARTIAL

On 24 March 1976, the Supreme Court held that a military accused does not have the right to lawyer counsel at a summary court-martial.¹ On 11 October 1977, the Court of Military Appeals held that, notwithstanding the Supreme Court decision, a military accused has a right to consult with a military lawyer prior to electing whether to refuse or accept nonjudicial punishment (if not aboard ship) or trial by summary court-martial.²

Any accused who elects to accept nonjudicial punishment or trial by summary court-martial, must execute, in writing, a voluntary, knowing, and intelligent waiver of his right to refuse either proceeding.³ Within the 2nd Marine Division, these documents are executed with an original and two copies.⁴ The original is placed in the serviceman's record book and a copy attached to the record of proceedings. The remaining copy is retained in the official records of the unit involved.⁵

Within the 2nd Marine Division, in order to manage the flow of the military accused desiring to seek counsel, the battalions usually "save-up" their accused for a period of a week and then transport them by vehicle to the Defense Counsel Section of the Division Legal Office.⁶ Accompanying the accused is a Service Record Book Clerk who records the fact that the accused did, in fact, have an opportunity to consult lawyer counsel.⁷ The defense counsel assigned to handle any particular group of accused gives the group, as a whole, a generalized briefing before he talks privately to each accused. The average time for each consultation is between 15 and 30 minutes.⁸ The time for forming the group of accused, transporting them to Division Legal, according them their rights to consult with lawyer counsel, and returning them to their unit requires, on the average, half a work day.⁹ As Table XIV indicates, there were 472 nonjudicial punishments and 48 summary court-martial cases during March 1978 within the 2nd Marine Division. Of the 17 Battalions assigned to the 2nd Marine Division, 15 were at Camp Lejeune, North Carolina, during the month of March 1978.¹⁰

By dividing the number of nonjudicial punishments and summary courts-martial (520) by the number of battalions (15), it can be ascertained that each battalion averaged 34 nonjudicial punishments for the month, or about seven (7) per week. Table XIV reflects that, during March 1978, the accused

TABLE XIV

STATISTICS SHOWING NUMBER OF ACCUSED, DURING PERIOD
1Jan-30Apr78, WHO SOUGHT LAWYER ADVISE PRIOR TO MAKING
DECISION WHETHER TO ELECT TO ACCEPT OR REJECT NJP
OR SCM WITHIN THE 2d MARINE DIVISION, CAMP LEJEUNE, N.C.

<u>Month</u>	<u>No. of NJPs Awarded</u>	<u>No. of SCMs Conducted</u>	<u>No. of Lawyer Consultations</u>	<u>Percent of Consults to No. of NJPs/SCMs</u>
Jan 78	667	35	243	35
Feb 78	637	44	276	41
Mar 78	472	48	285	55
Apr 78	553	48	286	48

Source: Statistics furnished from the records of the
Legal Office, 2d Marine Division, Camp Lejeune, N.C. 02842
by Major Edward Kline, USMC, Chief Defense Counsel for
the 2d Marine Division.

ected to consult with lawyer counsel in about 55% of the cases. By multiplying this percentage (55%) by the average weekly number of cases per battalion (7), it can be ascertained that each group brought to the Division Legal for consultation consisted of about four (4) accused who were accompanied by one (1) clerk and one (1) driver.

Table XIV also shows that there were 285 lawyer consultations during the month of March 1978. If each group consisted of four (4) accused, there were about 71 groups brought to the Division Legal for consultation. Assuming that each accused was a Private First Class (E-2), each driver was a Lance Corporal (E-3), each Clerk was a Corporal (E-4), and each Defense Counsel was a Captain (O3), a cost can be ascertained for these group consultations:¹¹

<u>Participant</u>	<u>Salary Per Hour</u>	<u>Man-Hours Consumed</u>	<u>Salary Cost Per Session</u>
Accused	\$2.48	4.5	\$11.16
Accused	2.48	4.5	11.16
Accused	2.48	4.5	11.16
Accused	2.48	4.5	11.16
Driver	2.63	4.5	11.84
Clerk	2.79	4.5	12.56
Defense Counsel	6.67	2.0	13.34
		Total	\$82.38

By multiplying the number of groups (71) by the cost per group (\$82.38), it can be seen that the consultations cost the 2nd Marine Division \$5,849 for the month of March 1978. By dividing the total cost (\$5,849) by the total number of nonjudicial punishments and summary courts-martial for March 1978 (515), we find that it cost the 2nd Marine Division about \$11.36 for each nonjudicial punishment and summary court-martial to comply with the new consultation requirement. This cost is above and beyond the cost of the nonjudicial punishment and summary court-martial proceedings themselves.

By using the number of nonjudicial punishments and summary courts-martial for fiscal year 1976, shown in Table II (excluding the nonjudicial punishment figures for the Navy),¹² one can ascertain that this right is costing the services in excess of two and one half million dollars each year.

CHAPTER XII

COSTING OUT THE RIGHT NOT TO BE TRIED BY A SUMMARY COURT-MARTIAL FOR A PURELY CIVIL-TYPE CRIME¹

On 11 October 1977, the Court of Military Appeals stated, in the case of United States v. Booker,² that summary courts-martial were to be limited to disciplinary actions concerned solely with minor military offenses unknown in civilian society. This meant that an assault by one unrated enlisted man upon another, not in the execution of police duties, was no longer triable by a summary court-martial.³ Neither were such civil-type crimes as possession of marijuana, misappropriation, and carrying a concealed weapon.⁴

During fiscal year 1976, the U.S. Navy and the U.S. Marine Corps reported 7595 trials by summary court-martial.⁵ Table XV shows that the separate offenses tried by these summary courts-martial totalled 11,118 and that, of this total, 1722, or 15½%, were civil-type offenses. Assuming this 15½% applied equally to all offenses across the board, then, by multiplying the total number of courts (7595) by 15½%, it can be ascertained that approximately 1177 summary courts-martial involved trials for civil-type offenses. Had the so-called "Booker" proscription existed at the

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TABLE XV

STATISTICS AS TO THE NUMBER OF CIVIL-TYPE AND MILITARY-TYPE OFFENSES
TRIED DURING FY 76 WITHIN THE NAVY AND MARINE CORPS

NON-BCD SPECIAL
COURT-MARTIAL

	MILITARY-TYPE OFFENSES				CIVIL-TYPE OFFENSES			
	ARTICLES		89-90 91-92		ARTICLES		92-4 134.16	
	85-86	87	OTHER	TOTAL	121	128	OTHER	TOTAL
* TRIED *	2967	117	790	4537	313	159	565	1353
* CONVICTED *	2814	96	626	4037	243	162	452	1032
* CONV. LIO *	22	1	5	31	5	2	2	9
								40
								5896
								5069

SUMMARY
COURT-MARTIAL

	MILITARY-TYPE OFFENSES				CIVIL-TYPE OFFENSES			
	ARTICLES		89-90 91-92		ARTICLES		92.4 134.16	
	85-86	87	OTHER	TOTAL	121	128	OTHER	TOTAL
* TRIED *	3884	201	1103	5763	160	126	348	825
* CONVICTED *	3726	168	897	5253	116	100	275	628
* CONV. LIO *	8	2	3	15	5	0	2	7
								22
								6588
								5887

SOURCE: Compiled from official statistics obtained on 13 April, 1978 from the
Office of the Judge Advocate General of The Navy, Washington, D.C.

commencement of fiscal year 1976, then these 1177 summary courts-martial could not have been convened during the ensuing fiscal year. If it can be assumed that a convening authority will refer an offense he perceives to be a summary court-martial-level offense to the next higher forum (if thwarted on the summary court-martial level), then it can be assumed that the aforesaid 1177 cases would have been tried by special court-martial.

By applying the above-mentioned 15 $\frac{1}{2}$ % to the total number of summary courts-martial convened for all of the services during fiscal year 1976 (9714),⁶ it can be approximated that 1506 such courts would have been tried by special court-martial, had the "Booker" proscription precluded their disposition on the lower level.

In Chapter IX,⁷ it was established that the approximate salary cost on the division level for a special court-martial was \$832. The cost for a summary court-martial was \$378. Thus, it can be seen that the "Booker" decision would have cost the armed services on the division level over two-thirds of a million dollars for fiscal year 1976, had it existed prior to the commencement of that fiscal year.

CHAPTER XIII

DESCRIBING THE RELATIONSHIP BETWEEN THE COST OF THE MILITARY JUSTICE SYSTEM AND COMBAT READINESS

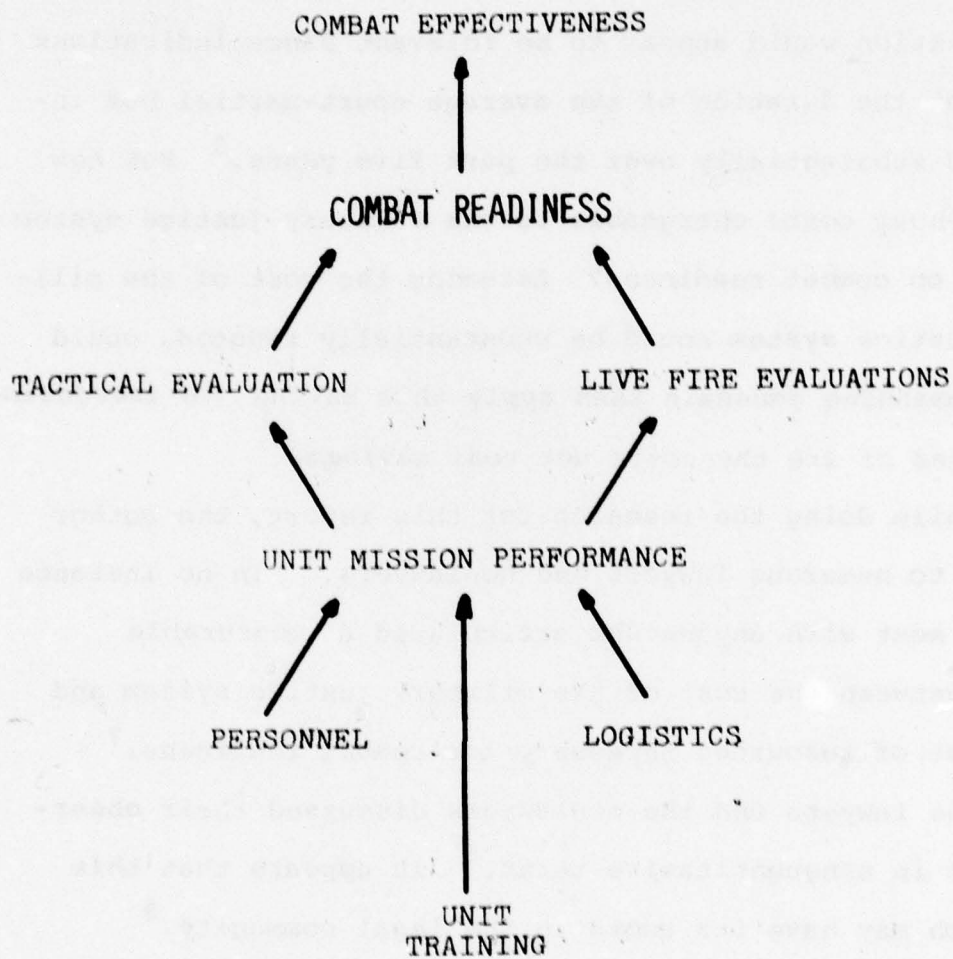
Chapter IV described a method to use in analyzing military justice. However, we have not yet discussed how one analyzes the nexus between combat readiness and the cost of any given legal right.¹

Figure 3 amplifies the fact that there are only three basic factors involved in combat readiness: personnel, logistics and training. However, as Appendices XXVII through XXIX reflect, the resources needed to transform these factors into combat readiness are scarce. In fact, field training in some commands has been curtailed because of the scarcity of funds even though,² as Appendix XXII shows, commanding generals consider training to be a critical factor in combat readiness.

Appendices XXIX and XXIII are examples of how military leaders continually reevaluate their combat readiness situation in order to minimize cost and maximize combat effectiveness. As Lieutenant General L. A. Brown, Commanding General, Fleet Marine Force, Pacific, recently informed the Fiscal Director of the Marine Corps, "we are taking every

FIGURE 3

FACTORS CONTRIBUTING TO COMBAT READINESS



SOURCE: Marine Corps Bulletin 3501, OTOR/slt of 9 December, 1977, "Marine Corps Combat Readiness Evaluation System (Short Title: MCCRES): Volume 1, Introduction."

conceivable management action to achieve across-the-board readiness with the money we have."³

One might ask that, while military leaders are exercising the limit of their imagination to overcome training deficiencies caused by budget restraints,⁴ what are the lawyers doing to streamline the military justice system? The question would appear to be relevant since indications are that the duration of the average court-martial has increased substantially over the past five years.⁵ But how do man-hour costs chargeable to the military justice system impact on combat readiness? Assuming the cost of the military justice system could be substantially reduced, could the commanding generals then apply this saving to increasing readiness or are the costs not real savings?

While doing the research for this report, the author talked to numerous lawyers and nonlawyers.⁶ In no instance did he meet with anyone who articulated a measurable nexus between the cost of the military justice system and the cost of resources necessary for combat readiness.⁷ Both the lawyers and the nonlawyers discussed their observations in nonquantitative terms.⁸ It appears that this approach may have its roots in the legal community.⁹

Military leaders should never forget that lawyers and certain categories of other individuals will almost always attempt to nonquantify every discussion regarding legal changes and legal rights.¹⁰ Lawyers come by this trait

naturally, of course, for they are required to continually deal with the subtle nuances of law.¹¹ However, the line officer himself should be wary of this approach when dealing with this particular subject matter. When he succumbs to this nonquantitative approach, he soon finds himself "out-classed" and in need of his "expert's" advice. In short order, he is dependent on that "expert's" advice and finds himself merely echoing the opinions and conclusions of his "expert."¹² Lawyers and other "experts" on nonquantitative matters do not mind this dependence. Intuitively, they appreciate the power that dependence brings.¹³ (Intuitively, the line officer resents it.)¹⁴

With regard to the impact of the legal system on combat readiness, the military leader should unshackle himself from the nonquantitative approach. He should remember that every complex system is composed of quantitative and nonquantitative factors and that the military justice system and the various systems in direct support of combat readiness are no exceptions.¹⁵

The mere fact, however, that both nonquantitative and quantitative factors are involved does not mean that the subject matter should be forever mired in a morass of ambiguity. There are plenty of quantitative factors available to use in measuring the cost of the military justice system and its impact on combat readiness. The military

leader would be wise to leave the nonquantitative factors to the "experts" who deal with such matters. He himself should insist on a meaningful and measurable cost analysis. Moreover, in response to those who might argue that any savings in manpower might not adhere to the direct benefit of combat readiness, he should point to the areas where man-hour savings would directly increase combat readiness. In response to the argument that a savings in a commander's time spent on legal matters will not directly increase readiness (because "he's there anyway"),¹⁶ one need only to point to the man-hours spent by staff personnel on such matters.

As was discussed in Chapter IX, Table V sets forth the cost, in man-hours, of time spent on military justice matters within the 2nd Marine Division.¹⁷ As Table XVI reflects, only 22% of the man-hours set out in Table V involved leaders. The remaining 78% involved support personnel. Moreover, as was pointed out in Chapter IX, Table XV does not reflect physical resource costs or salary costs for witnesses, accused, escorts, drivers and military police. (Statistics are not presently available to measure these particular costs, but could be obtained with a reasonable amount of time and manpower.)¹⁸

By pointing to the impact on his support staff, the military leader is on firm ground. The size of the support staff for any military organization is based on the support

TABLE XVI

STATISTICS AS TO MAN-DAYS EXPENDED EACH WORKING DAY BY STAFF AND NONSTAFF PERSONNEL
WITHIN THE 2ND MARINE DIVISION DURING JANUARY 1977 ON MILITARY JUSTICE MATTERS

	OFFICE OF SJA	MILITARY JUDGES	DIVISION HQ	REGIMENTAL HQ	BATTALION HQ	COMPANY	TOTAL MAN-HOURS
Staff	55.78	4.24	7.34	6.81	22.97	32.66	129.80
Nonstaff	.00	.00	.25	.94	5.27	30.42	36.88
Total Man-Days	55.78	4.24	7.59	7.75	28.24	63.08	166.68

SOURCE: Figures based on statistics from unpublished report in author's files,
compiled by the U.S. GAO, Norfolk, VA. during January 1977.

needs of that organization. If those needs diminish, so should the need for the size of the staff. Any diminishment in personnel is a direct cost savings. Although formal change to an organization may be a complex matter, it need not be. Those military leaders who have the authority to urge appropriate Congressional legislation, also have the authority to make such organizational changes expeditiously. The more man-hours and physical resources available to the commander, the greater should be his combat readiness.¹⁹

Last, but perhaps the most important point to make in this discussion, is the fact that the man-hours expended by the leader ("who's there anyway") should not be discarded in any computation of impact cost. Although the military leader needs to be able to show, separately, the cost of his support personnel, he should do so only to keep such discussions on a quantitative basis. His time and that of his subordinate leaders is obviously critical to combat readiness.²⁰ Although savings in a leader's time may not result directly in dollar savings, it will increase combat readiness. By putting a dollar value on his time as well as that of his support personnel, the line officer can show, in measurable terms, how much the military justice system is costing the military services. Any increase in man-hours required can be easily measured. If

the increase appears to be prohibitive, appropriate action should be initiated.

In summary, it can be seen that the simplest approach to use in measuring the nexus between combat readiness and the cost of any given legal right is to use a surrogate measure. That surrogate measure is the cost of the lost man-hours and physical resources which were expended on military justice matters. Such a surrogate measure is easy to understand and, given a reasonable amount of effort, it is easy to compute.

CHAPTER XIV

CONCLUSIONS AND RECOMMENDATIONS

There appears to be little doubt that our present military justice system is in substantial disarray, too costly, and in need of major repair. If another Vietnam-type war should occur before corrective action is taken, there is little doubt that the system would prove to be exceedingly ineffective, extremely expensive, and very disruptive to combat readiness. Corrective action is urgently needed. Despite the valiant efforts of some of our Judge Advocates General, enough is not being done and it is not being done within the time frame needed. Only the line officer community can rectify the situation quickly and effectively. They can do this best by continually insisting on a quantification of the problems and swift resolutions. Military leaders should get directly involved. They should be using their lawyers to resolve their problem and not vice versa. The problems are easily correctible, but not by the methods presently being used by the lawyers. Although noteworthy, the lawyers' efforts are embroiled in an approach too cumbersome for easy solution, too complex for anyone but the lawyer to understand, and too narrow for an effective appreciation of the intricacies of command and the duties of the line officer.

In order for the line officer community to ensure that their actions remain as meaningful as possible, it is recommended that:

1. If they need to delegate further analyses of thoughts contained in this research report, they delegate it to other line officers.¹
2. They take immediate steps to commence maintaining complete statistics as to the man-hours and physical resources being expended on those extrinsic rights set forth in Chapters VI through VIII.²
3. They evaluate and reevaluate, on a continuing basis, those extrinsic rights set forth in Chapters VI through VIII in terms of their cost to the military and their benefit to the accused.
4. They take appropriate action to educate all line officers: that the military justice system belongs to them;³ that it need not be a system inherently adverse to the needs of the command; that where the system costs too much, it can and should be reevaluated quantitatively for purposes of formulating timely ameliorative action; that since the military justice system belongs to the military leaders, they should run the system and not vice versa; and

that they should resoundly resist being categorized as mentally incompetent of comprehending the meaning of justice, fair play, and impartiality.⁴

5. That they take immediate steps to abolish the following rights of accused:
 - a. Right to refuse nonjudicial punishment;⁵
 - b. Right to refuse trial by summary court-martial;⁶
 - c. Right to raise the Catlow/Russo motion;
 - d. Right to have a Staff Judge Advocate's pre-trial letter sent to the convening authority prior to the accused being referred to trial by general court-martial;
 - e. Right to have a Staff Judge Advocate's review letter (regarding legality of findings) be sent to the Commanding General in those cases where the flag officer must review the record of trial;
 - f. Right to have an individually requested military lawyer, situated more than 100 miles away, be made available, regardless of his availability;
 - g. Right to have witnesses from outside of a war zone appear in person at a trial conducted within that war zone if that witness is only a witness in extenuation and mitigation or if that witness' testimony would be cumulative.⁷
 - h. Right to an Article 32 hearing.
6. That concerted effort be made to effectuate the proposed legislation discussed in Appendix XV which would permit further review of court-martial cases to the Supreme Court.⁸

7. That concerted effort be made to block the proposal set forth in Appendix XX to eliminate administrative discharges in lieu of court-martial until such time as the corrective action already needed to rectify the present disarray of the military justice system can be effected. Furthermore, the elimination proposal should not be effected until the line officer community has had time to thoroughly analyze its effect on combat readiness. They were not consulted regarding the formulation of this proposal and they should not acquiesce in its acceptance.⁹
8. That the line officers establish their own standing committee to continually monitor the impact of present and proposed military law on the ability of the commander to perform his duties.¹⁰ This committee could then, through proper channels, provide meaningful input to the legal community and its standing committee.

NOTES

CHAPTER I

1. Remarks made by Admiral Shear on 18 October 1976 to an assemblage of the attendees to the 1976 Annual Navy-Marine Corps Judge Advocate General Conference conducted in Washington, D.C.

2. It is recognized that, while a lawyer may not use legal rhetoric, there is no way that he can totally divorce himself from legalistic approaches to analyses.

3. See Ch. II *infra*.

4. The term *laissez faire*, as used here, is not meant to denote an intentional disregard of the military justice system, but rather an unconscious relinquishment of control over that system.

5. In Chs. II and XIII, the author describes how only the line officer community can rectify the gross weaknesses that exist in our present military justice system.

6. This report explains how the military justice system can be analyzed quantitatively and corrective action taken by means of legislative changes. Such changes can take considerable time. If, as Chapter II pp. 3-12, points out, the proposed changes come too late or move too slowly, the military justice system will probably not be able to cope with the exigencies of another Vietnam-type war. See Appendices VI through VIII, for example, of how the accused can presently manipulate the system and turn any court-martial into an exceedingly expensive undertaking. For those who might conclude that the conduct of those defense counsel referred to in Appendices VI through VIII is unethical, they should read, for a contrary opinion, Donald J. Glazen, "What are the Limits of Lawyer's Professional Conduct in Defending a Client," *Florida Bar Journal*, June 1976, p. 332. See also William H. Schaap, "Justice for G. I. Joe," *Juris Doctor*, March 1978, p. 19, wherein he admits: "What makes the witness cases so important is that in the military all required witnesses are produced at government expense, even if a civilian must be flown half-way around the world. The leverage this gives a defense attorney can be significant." See also the Court of Military Appeals' decision in *United States v. Willis*, 1 M.J. 384 (C.M.A. 1975) wherein they expanded the accused's right to witnesses. See also the Court of Military Appeals' decision in *United States v. Palenius*, 2 M.J. 86, 90 (C.M.A. 1977), wherein the Court stated that the defense counsel must render the accused "informed advice to his client with respect to the evidence and available options." (Emphasis added).

Chapter II

1. William T. Generous, Jr., Swords and Scales (Port Washington, N.Y.: Kennikat Press, 1973), p. 48, quoting Frederick Bernays Wiener. Wiener also predicted before the same Congressional Subcommittee meeting in which he quoted General Sherman that "the Court of Military Appeals would run aground on at least two shoals: first, courts of such limited jurisdiction had always been staffed by poorly qualified men; and second, civilians sitting on the proposed bench would be unable to comprehend the subtleties of sophisticated military cases."

2. Schlesinger v. Councilman, 420 U.S. 738, 757 (1974).

3. Figure 1 does not reflect the fact that the Marine Corps did not become a part of the Department of the Navy until the Act of June 30, 1834. Prior to that date, a Marine Corps Unit followed the law of the branch of the service to which it was attached. See William Winthrop, Military Law and Precedents (Washington: Government Printing Office, 1920), p. 74.

4. Act of May 5, 1950, Pub. L. No. 81-506, § 1, 64, Stat. 108. This act has subsequently been amended and codified as Uniform Code of Military Justice, arts. 1-140, 10 U.S.C. §§ 801-940 (1970), hereinafter cited as U.C.M.J. or the Code in text and in footnotes.

5. During the past half century, there has been a steady erosion of the commanding officer's authority over courts-martial. Accompanying this erosion is the ever-increasing recognition that the military accused is entitled to many of the same constitutional rights as his civilian counterpart. See, for example, United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967) and O'Callahan v. Parker, 395 U.S. 258 (1969). Also accompanying this erosion, is the projection of the lawyers into the court-martial proceedings on an ever-increasing basis. See note 4 supra and Figure 1.

6. The author could find no evidence of today's controversy over the unified military justice system having ever reached the same magnitude before.

7. The judge advocates general are not, themselves, subordinate to the judges of the appellate courts, but their judge advocates practicing military criminal law are.

8. United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974).

9. United States v. Russo, I.M.J. 134 (C.M.A. 1975).

10. In re Grimley, 137 U.S. 147 (1890).

11. O'Callahan v. Parker, 395 U.S. 258 (1969).

12. Schlesinger v. Councilman, 420 U.S. 738 (1975).

13. United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

14. Schlesinger v. Councilman, 420 U.S. 738 (1975).

15. United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976).

16. United States v. Gonzales, NCM 76 0787 (N.C.M.R. 20 September, 1976 unpublished).

17. See United States v. Saulter, 1 M.J. 928 (N.C.M.R. 1976); United States v. Turner, 1 M.J. 1035 (N.C.M.R. 1976); United States v. Roulo, 1 M.J. 1071 (N.C.M.R. 1976).

18. See n. 15 supra and United States v. Moore.

19. See United States v. Merchant, 2 M.J. 731 (A.F.C.M.R. 1976); United States v. Schocker, 2 M.J. 724 (A.F.C.M.R. 1976); United States v. Batson, 2 M.J. 716 (A.F.C.M.R. 1976); United States v. Clay, 2 M.J. 721 (A.F.C.M.R. 1976);

20. United States v. Alef, 3 M.J. 414 (C.M.A. 1977).

21. Ibid.

22. Ibid.

23. United States v. Booker, 3 M.J. 443 (C.M.A. 1977).

24. See Appendix III.

25. See Appendix IV, pp. Iv-5 - IV-6.

26. See Appendix XVI.

27. See Appendix VII for confirmation of this concern.

28. See W. Hays Parks, "Crimes in Hostilities," Marine Corps Gazette, 2 November 1976, p. 3.

29. See ns. 8 and 9 supra.

30. See *United States v. Willis*, 3 M.J. 94 (C.M.A. 1977), wherein the court held that military convenience is not a relevant consideration in any decision whether to produce a requested witness. The court went on to say that once materiality is shown, the government must either produce the witness or abate the decision. See also Appendices VI through VIII.

31. Ibid.

32. By the word "jury" is meant a members court.

33. In the case of *United States v. Russo*, 1 M.J. 134, 137 (C.M.A. 1975), the Court of Military Appeals held that enlistments involving recruitment misconduct are void. Once the issue of a void enlistment was raised, the government had an affirmative duty to "establish jurisdiction over him."

34. This assertion is based on the author's observations and experiences as a General Court-Martial Judge during 1974-1975 and as the Director, Appellate Government Division, Navy JAG during 1972-1974.

35. This assertion is based on the author's personal experience as a military justice officer for the 1st Marine Division in Vietnam during 1966.

36. Stated during an interview with author on 12 April, 1978 by the Judge Advocate General of the Navy.

Chapter III

1. See Ch. XIII *infra* for more detail.

2. See Ch. X for details as to most recent increase.

3. See Office of the Assistant Secretary of Defense (Comptroller), National Defense Budget Estimates for FY 1978, p. 138.

4. See Arthur T. Hadley, "Soviet Equipment Tops NATO Arms," The Providence Sunday Journal, 4 June 1978, p. 1:1-2.

5. It is the author's opinion that the discussions set forth in Chapter II support this contention.

6. By the term "misled" is meant that those presently overseeing the military justice system are not advising the law officers of such matters. See Appendix XV as to attitude of the 1978 class of the Naval War College regarding certain aspects of the military justice system.

7. This conclusion is based in part on Appendix XV; in part on the results of numerous conversations with line officers during the research on which this report is based; and in part on a paucity of any written record of such a recognition on the part of line officers.

8. By the phrase "price tag on justice" is meant that the military justice system can be broken down into different types of rights whose cost in terms of man-hours and physical resources could be measured if adequate records were maintained.

9. It is realized that the groups in question will take issue with this assertion. However, if a group really wants to demonstrate its desire to work forthrightly with the line officer community, they need only do so.

10. Judge Advocate General's School, United States Army, Cases and Materials on the Analysis of the Military Criminal Legal System, Volume I, 2nd ed. (Charlottesville, VA.: 1975), p. 2.

11. See Ch. XIII infra.

12. See Tom Philpott, "Changes to U.C.M.J. Proposed by C.M.A.," The Navy Times, 21 November 1977, p. 1:4-5. See also Tom Philpott, "Some Critical of CMA's 'Revolution,'" The Navy Times, 28 November 1977, p. 24:1-5.

13. Ibid.

14. Assertion based on personal research and conversation with numerous lawyers in Washington, D.C. during the research phase of this study.

15. See Tom Philpott, "DOD Counsel Would Abolish CMA," The Navy Times, 3 April 1978, p. 20:1-4.

16. Uniform Code of Military Justice, art. 67 (g), 10 U.S.C. § 867(g) (1970).

17. U.C.M.J. art. 67(g) does not usurp the nonlawyers' authority to participate in changes to the law. It mainly states that the judge advocates general and the Court of Military Appeals will meet annually to report number and status of pending cases and any recommendations relating to uniformity of policies.

18. Task Force on the Administration of Military Justice in the Armed Forces, Report on the Task Force on the Administration of Military Justice in the Armed Forces, Vol. 1 (Washington: U.S. Dept. of Defense, 1972), introductory material, pp. unnumbered.

19. Ibid., Vol. I, pp. 112-127.

20. Ibid., Vol. II, pp. 104-105.

21. U.S. General Accounting Office, Need For and Uses of Data Recorded on DD 214, Report of Separation from Actual Duty, 23 January 1975 (Washington: U.S. General Accounting Office, 1975); U.S. General Accounting Office, Urgent Need for a Department of Defense Marginal Performer Discharge Program, 23 April 1975 (Washington: U.S. General Accounting Office, 1975); U.S. General Accounting Office, More Effective Criteria and Procedure Needed for Pretrial Confinement, 30 July 1975 (Washington: U.S. General Accounting Office, 1975); U.S. General Accounting Office, People Get Different Discharges in Apparently Similar Circumstances, 1 April 1976 (Washington: U.S. General Accounting Office, 1976); U.S. General Accounting Office, The Clemency Program of 1974, 7 January 1977 (Washington: U.S. General Accounting Office, 1977); U.S. General Accounting Office, Millions Being Spent to Apprehend Military Deserters Most of Whom are Discharged as Unqualified for Retention, 31 January 1977 (Washington: U.S. General Accounting Office, 1977); U.S. General Accounting Office, Military Jury System Needs Safeguards Found in Civilian Federal Courts, 6 June 1977 (Washington: U.S. General Accounting Office, 1977); U.S. General Accounting Office, Eliminate Administrative Discharges in Lieu of Courts-Martial: Guidance for Plea Agreements in Military Courts is Needed, 28 April 1978 (Washington: U.S. General Accounting Office, 1978).

22. Assertion based on personal conversations with GAO team members who were doing surveys at Camp LeJeune, N.C., during 1975-1977.

23. The proposal contained at Appendix XX would substantially increase the cost of the military justice system and the number of courts-martial within the armed services. Such a cost can be computed using approaches and data contained in this report. Using FY 76 data, the additional annual cost would be in the millions of dollars.

24. Ibid.

25. Jimmy Carter, "Address to People of Other Nations: President's Remarks to People of Other Nations on Assuming Office." Weekly Compilation of Presidential Documents, 24 January 1977, pp. 89-90.

26. By the phrase "extrinsic to the Constitution" is meant not guaranteed by the minimum requirements of the Constitution, as presently interpreted by the Supreme Court.

27. By the phrase "directly involved in the matter" is meant taking an active role in the running of the military justice system and in committees established to propose changes to that system.

Chapter IV

1. See Edward F. Sherman, "Military Justice Without Military Control," 82 Yale L.J., 1973, pp. 145-163.

2. See John T. Willis, "The United States Court of Military Appeals - "Born Again," 52 Indiana Law Journal, 1977, pp. 151-166.

3. See Luther West, "A History of Command Influences on the Military Justice System," 18 U.C.L.A. L. Rev. 1970, p. 1.

4. See Edward F. Sherman, "The Civilization of Military Law," 22 ME. L. Rev., 1970, p. 61.

5. See Appendix XVI, p. XVI-7.

6. By the word "irrelevant" is meant not relevant for an analysis of the system as opposed to an analysis of a legal concept.

7. An example of a "substantive" right is the right against self-incrimination. An example of a procedural right is the right to a peremptory challenge of a court member.

8. See *Schlesinger v. Councilman*, 420 U.S. 738 (1974).

9. See Appendix XVI, p. XVI-8.

10. During the research phase of this study, the author found some line officers saying, in effect, "The accused doesn't have too many rights; it's the procedure that's too cumbersome." See Ch. III, n. 6 *supra*.

11. See n. 8 supra.
12. See n. 7 supra.
13. See Appendix IV, p. IV-19. Chief Judge Fletcher envisions two systems: one for the alleged "discipline level" and one for the alleged "judicial level."
14. See Appendix IV, p. IV-19. By "judicialization" is meant: Controlled by the judge vis-à-vis the commanding officer.
15. By "civilization" is meant: making the military justice system more like a mirror image of the civilian court system. See also notes 1 and 4 supra.
16. By "quantification" is meant measurable.
17. By "nonquantifiable" is meant not measurable.
18. By "intrinsic rights" is meant rights which the minimum requirements of the Constitution, as presently interpreted by the Supreme Court, require to be afforded a serviceman.
19. See Appendix XXI. The proposal contained in Appendix XXI was pending on the OMB level as of 8 June, 1978.
20. Ibid.
21. Ibid.
22. See n. 8 supra.

Chapter V

1. During the period 10-14 April 1978, the author traveled to Washington, D.C., and interviewed department and section heads in the offices of: Code OT (Training), Headquarters, Marine Corps; Code JA (Judge Advocate Division, Headquarters, Marine Corps; the Judge Advocate General of the Navy; the Assistant Judge Advocate General of the Navy for Military Justice; the Criminal Law Division, Army JAG; and the Criminal Law Division, Air Force JAG. During the period 17-21 April 1978, the author traveled to Camp Lejeune, N.C. and interviewed: the lawyers of the 2nd Marine Division; the general court-martial judges assigned to the Navy-Marine Corps Judiciary Activity, Camp LeJeune,

N.C.; the special court-martial judges assigned to the Marine Corps Judiciary Activity, Camp LeJeune, N.C.; the Commanding General and the Assistant Division Commander, 2nd Marine Division; the offices of the G-1 and G-3, and the Division Provost Marshal; the 2nd, 6th, 8th Marine Regiments and selected battalions and companies attached thereto; and the 2nd Tank Battalion and the companies attached thereto. Upon his return to Newport, R.I., the author has maintained telephone communications with the aforementioned legal offices situated in Washington, D.C.. Moreover, while conducting the survey reported in Appendix XV, the author personally discussed his research project with at least fifty students of the Naval War College.

2. This assertion is based on the results of conversations with numerous lawyers and nonlawyers during the research phase of this study.

3. This assertion is based on the author's personal observation as a Staff Judge Advocate at Camp LeJeune, N.C., during the period 1975-1977.

4. By the term "less expensive way out" is meant less expensive in terms of man-hours expended on "riding" the service of the service member involved. See Appendix XVI, p. XVI-4 and Appendix XVIII, p. XVIII-1.

5. U.S. Army, Personnel Separations, AR 635-200 (Washington: 21 November 1977); U.S. Navy, Bureau of Naval Personnel Manual, art. 3850220, (Washington: n.d.); U.S. Marine Corps, Marine Corps Expeditious Discharge Program, MC Bul 1900, MPP-37-dlm (Washington: 12 November 1975); U.S. Air Force, Separations Upon Expiration of Term of Service for Convenience of Government, Minority, Dependency, and Hardship AFR 39-10 (Washington: 3 January 1977). See Ch. IV Table 2, p. 29, as to the number used each fiscal year since 1974 and for the source of this information.

6. See also Table I supra.

7. See Figure 1 supra. By the term "qualify" is meant: meet the requirements set forth as a basis for such a discharge.

8. This assertion is based on the author's personal experience dealing with commanding officers while he was a Staff Judge Advocate at Camp LeJeune, N.C. during the period 1975-1976. See also Appendix XVI, p. XVI-4 and Appendix XVIII, p. XVIII-1.

9. Perhaps even the "spirit" of the regulation. See Appendix XXIV as an example of a regulation. See also Ch. VIII infra; Appendix XVI, p. XVI-4; and n. 8 supra.

10. *United States v. Booker*, 3 M.J. 443 (C.M.A. 1971).

11. *Ibid.*

12. *Ibid.*

13. See U.S. Army, "Personnel Separations", AR 635-200 (Washington: 21 November 1977), p. 10; U.S. Navy, *Bureau of Naval Personnel Manual*, art. 3650220 (Washington: n.d.); U.S. Marine Corps, *Marine Corps Separations and Retirement Manual*, MCO, p. 1900.16B (Washington: 23 March 1978), Ch. 6, p. 43; U.S. Air Force, *Separations for Unsuitability, Unfitness or Misconduct; Resignation or Request for Discharge for Good of the Service, and Procedures for the Rehabilitation Program* (Washington: 20 July 1976), p. 21.

14. See Ch. VII infra.

15. This assertion is based on conversations with numerous line officers during the research phase of this study. See n. 1 supra.

Chapter VI

1. *Middendoff v. Henry*, 425 U.S. 25 (1976). See also Rufus O. Young, Jr., "Due Process in Military Probation Revocation: Has Morrissey Joined the Service?" 65 Mil. L. Rev., Fall 1975, pp. 1-56.

2. A Navy accused is an example only because of the JAGMAN citation on pp. 29-30. An accused's rights may emanate from several sources: the Constitution, as interpreted by the Supreme Court; the U.C.M.J.; the Manual for Courts-Martial, United States, 1969 (Rev. ed.), [hereinafter cited as MCM, 1969 (Rev.)]; Presidential Regulations; and departmental regulations.

Chapter VII

1. Act of May 5, 1950, Pub. 6 No. 81-506, § 1, 64 Stat. 108. This act was subsequently amended and codified as Uniform Code of Military Justice arts. 1-140, 10 U.S.C. §§ 801-940 (1970).

2. See Ch. VI, n. 2.

3. A Navy accused is used as an example only because of the JAGMAN and SECNAV Note Citations on p. 46.

Chapter VIII

1. See Bradley K. Jones, "The Gravity of Administrative Discharges," 59 Mil. L. Rev. Winter 1973, p. 1.

2. See R. O. Everett, "Military Administrative Discharges - The Pendulum Swings," Duke L.J., 1966, p. 41.

3. See Ch. V, Table I, p. 27 supra for a list of the various types of administrative discharges in the Air Force. See also Appendix XXV for a general discussion of the rights of a respondent in the U.S. Navy and U.S. Marine Corps.

4. See ns. 1 and 2.

5. See Ch. V, Table II, p. 29 and memorandum from Secretary of Defense to Secretaries of the Military Departments, subj: Report of the Task Force on the Administration of Military Justice in the Armed Forces, 11 January 1973, wherein the Secretary of Defense directed military departments to revise their procedures for OTHC discharges to permit respondents opportunity to consult with a military lawyer at the outset of the procedure for elimination.

6. Ibid.

7. See Appendix XXV.

8. See Appendix XXV, pp. XXV-1 - 2.

9. In fact, the author encountered few line officers who had a clear understanding of what rights a respondent is usually afforded in connection with a pending administrative discharge.

10. See *United States v. Thomas*, 1. M.J. 397, 405 (C.M.A. 1976) wherein Chief Judge stated: ". . . the points of all such inspections may not be used either as evidence in a criminal or quasi-criminal proceedings . . ." It is not certain what Chief Judge Fletcher meant by "quasi-criminal proceedings." He may have been referring to non-judicial punishment, summary court-martial, or administrative discharge proceedings.

Chapter IX

1. Based on personal knowledge of the author who was assigned the duty of Military Sponsor for the GAO team.

2. Ibid. Also based on copies of files retained in author's files.

3. At his request, the GAO team gave the author a copy of the statistics they obtained during their survey.

4. The author has been given excerpts from a copy of the proposed GAO report covering this survey. It contains a disclaimer of such use in the future.

5. The statistics compiled by the GAO team appear to be accurate. During the week 17-21 April, 1978, the author visited the 2d Marine Division, Camp LeJeune, N.C. where he discussed the workload created by the military justice system with commanding officers in every regiment from the company level on up. Subsequent to his return to Newport, R.I., the author received numerous letters discussing legal workloads within the line units. These letters are retained in the author's files. In every instance, they corroborate the GAO statistics. See also Ch. V, n. 1 and Appendix XIV.

6. See n. 1 supra.

7. See Appendix XXVI. In discussion on 9 May, 1978 with the army officer from the Criminal Law Division, JAG Army, Washington, D.C., who allegedly drafted the correspondence at Appendix XXVI, it was ascertained that the costs represented therein were largely based on "guestimate." There was no effort to obtain cost figures from commands in the field.

8. It is realized that such an extrapolation for non-lawyers may not be totally accurate but, based on the author's experiences and research with regard to these matters, it should be fairly accurate.

Chapter X

1. See *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974); *United States v. Russo*, 1 M.J. 134 (C.M.A., 1975). See also Ch. VII, p. 45.

2. See Appendix VIII.

3. Ibid.

4. This assertion is also based on discussions with various general court-martial judges conducted during the research phase of this study.

5. Ibid.

6. If fact, jury trials have slightly decreased as is reflected by Ch. IX, Table XIII, p. 70.

7. This assertion is based on the author's experience as a criminal lawyer with the Navy and Marine Corps for the past 13 years.

Chapter XI

1. Middendoff v. Henry, 425 U.S. 25 (1976).

2. United States v. Booker, 3 M.J. 443 (C.M.A. 1977). See also U.C.M.J. art. 15 which states an accused cannot refuse nonjudicial punishment while embarked aboard ship.

3. Ibid.

4. U.S. Marine Corps, 2nd Marine Division, Office of the Staff Judge Advocate, U.S. v. Booker, 3 M.J. 443 (CMA 1977), OSJA Memorandum 17/RLV/dcg over 5800, 27 October, 1977 (Camp LeJeune, N.C.: 1977).

5. Ibid.

6. Based on interview on 19 April, 1978 with Major Ed. Kline, USMC, Chief Defense Counsel, 2d Marine Division, Camp LeJeune, N.C.

7. Ibid.

8. Ibid.

9. Ibid.

10. Determined by personal discussions on 18 April, 1978 with the G-3, 2d Marine Division, Camp LeJeune, N.C.

11. The cost calculation does not include expense for transportation or overhead of facilities.

12. Figures for the Navy were excluded because an accused cannot refuse nonjudicial punishment while embarked aboard a ship. See U.C.M.J., art. 15.

Chapter XII

1. By the terms "civil-type crime" is meant a crime triable by civil courts vis-a-vis military-type crimes which are triable only by military court.

2. United States v. Booker, 3 M.J. 443 (C.M.A. 1977).

3. The offense of "assault" upon a serviceman who is in the execution of police duties is a military offense whose maximum punishment is greater than simple assault and battery.

4. Most purely civil-type crimes are not minor crimes (e.g., larceny, murder, rape, robbery, extortion, kidnapping, and manslaughter).

5. Total number was compiled from Ch. V, Table II, p. 29.

6. Ibid.

7. See Ch. IX, p. 59.

Chapter XIII

1. See Chs. IX through XII.

2. See Appendices XXVII through XXIX.

3. Statement contained in an undated letter submitted during March 1978 from the CGFMFPAC to the Fiscal Director, HQ Marine Corps. Excerpts of this letter are contained in author's files.

4. Ibid. Letter also states in part that imaginative alternatives are being pursued to maintain the highest degree of combat readiness possible despite budget restraints.

5. See Ch. X, p. 67.

6. See Ch. V, n. 1.

7. Most line officers appeared to believe the military had no choice but to go along with the Court of Military Appeals' case-by-case definition of justice. They spoke, for the most part, in terms of restraint. But see Appendix XIV.

8. Ibid.

9. This is only the author's assumption based on his own personal experiences. See Ch. II, n. 34 *supra*.

10. See Chs. V, n. 1 and II, n. 34 *supra*.

11. See Ch. II, n. 34 *supra*.

12. Ibid. By the word "expert" is meant a person who specializes in a particular subject matter.

13. See n. 9 *supra*.

14. Ibid. See also Ch. V, n. 1 *supra*.

15. See also Ch. IV, p. 27.

16. This argument was posed to the author several times during the research phase of this study. See Ch. V, n. 1 *supra*.

17. See Ch. IX, Table V, p. 60 *supra*.

18. See Ch. XIV, p. 88 *infra*, as to the author's recommendations in this regard.

19. See Appendix XXX.

20. See Appendix XXIII.

Chapter XIV

1. See Ch. XIII, p. 83.

2. The author was amazed at the paucity of meaningful statistics regarding the quantitative cost of the military justice system and its impact on readiness.

3. It belongs to them as it does all military servicemen. It is the author's contention that since the military leader supervises all servicemen, it is the military leader and not the lawyer who should ultimately supervise the military justice system.

4. See Appendix IV, p. IV-19.

5. But see mixed reactions to questions 30 and 31 of Appendix XV. See also Ch. VI, p. 35.

6. Ibid. See also Ch. VI, p. 38.

7. See Appendices VI and VII.

8. See Ch. IV, p. 22, wherein it was discussed that such legislation would be necessary before any changes could be made to an accused's right which the Court of Military Appeals states is protected by due process. Such legislation would be required before any changes could be made to the Court of Military Appeals' rule that off-base use of drugs is not "service-connected."

9. See Appendix XVIII, p. XVIII-1, wherein it is alleged that Air Force Commanding Officers depend on the availability of the administrative discharge avenue of disposition. See also Appendix XVI, p. XVI-4.

10. This committee should be a JCS-level committee, chaired by a flag-rank officer and composed of only line officers. It is the author's opinion that the assignment of one lawyer to this committee would neutralize all efforts to quantify existing problems. See Ch. XIII, pp. 82-84.

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APPENDIX I

SELECTED DECISIONS OF THE COURT OF MILITARY APPEALS
FOR PERIOD 1975-1977

SOURCE: Compilation provided author on 12 April 1978
by Criminal Law Division, Army JAG, Washington, D.C.

SELECTED DECISIONS OF THE UNITED STATES
COURT OF MILITARY APPEALS (1975-1977)

1. In United States v. Russo, 23 USCMA 511, 50 CMR 650 (1975), and United States v. Burden, 23 USCMA 510, 50 CMR 649 (1975), the Court held that recruiter misconduct in knowingly enlisting an ineligible person prevents exercise of court-martial jurisdiction over that person, even if he served for months after enlistment. Disproving claims of recruiter misconduct is sometimes impossible, and ordinarily expensive because witnesses are distant. Government appellate attorneys are trying to limit the effect of these decisions in current cases.
2. In United States v. Jordan, 23 USCMA 525, 50 CMR 664 (1975), the Court first held that evidence derived from a search of a service member by foreign officials in a foreign country would be inadmissible against that member in a court-martial, unless the search met Fourth Amendment standards. On reconsideration, the Court modified the standard to require that the search meet Fourth Amendment standards, or that it be conducted in accordance with local law, without any instigation or participation by United States officials, and that it not shock the conscience. United States v. Jordan, 24 USCMA 156, 51 CMR 375 (1976). Jordan overruled the long-standing precedent, United States v. DeLeo, 5 USCMA 148, 17 CMR 148 (1954), without necessity for the facts of the case mandated reversal even under the DeLeo standard. USCMA is the only court which has extended the exclusionary rule to this extent in foreign searches. Its approach was specifically rejected by the 5th Circuit in United States v. Morrow, 537 F.2d 120 (5th Cir. 1976). The practical effect of Jordan probably will be that host countries will assume jurisdiction of a greater number of cases, thereby depriving accused service members of other Constitutional rights.
3. In United States v. Ware, 24 USCMA 102, 51 CMR 275 (1976), the Court invalidated the Manual for Courts-Martial provision which permitted a convening authority to overrule a military judge who dismissed a charge on an issue of law. Legislation to create another method of Government appeal is being drafted by the Joint Service Committee on Military Justice.
4. In footnote 10 of the Ware case, supra at 277, the Court cast doubt on the President's power to promulgate much of the Manual for Courts-Martial. In practice, the Manual's content is drafted by the services. There are

several indications that the Court wishes to take over the rule-making power. A statutory amendment to reaffirm the President's power has been drafted by the Joint Service Committee on Military Justice.

5. In United States v. Moseley, 24 USCMA 173, 51 CMR 392 (1976), it was held improper for trial counsel to argue that the Court should consider the deterrent effect upon others in determining an appropriate sentence. The abandonment of this concept strikes at the rationale of the services' sentencing and rehabilitation philosophies. Government appellate attorneys are trying to convince the Court to reconsider its ruling in later cases.

6. In United States v. Henderson, 24 USCMA 259, 51 CMR 711 (1976), the Court dismissed charges arising out of a murder-for-hire conspiracy for lack of speedy trial. Specific speedy trial time rules have been created by the Court; they are not found in the Code. "Escape valve" rules for speedy trial calculations should be included in the next comprehensive package of Code amendments.

7. In Harms v. United States Military Academy, Misc. Docket No. 76-58 (CMA, 30 Jul 76), the Court did not disclaim jurisdiction to review administrative separation of West Point cadets. There is no statutory basis for such jurisdiction. It indicates a general disposition on the part of the Court to want to review administrative actions of the services. This case is the type in which Department of Justice assistance may be sought to question USCMA jurisdiction in Federal court.

8. In McPhail v. United States, 24 USCMA 304, 52 CMR 15 (1976), the Court directed The Judge Advocate General of the Air Force to take action in a special court-martial case which would not have come before the Court in the ordinary course of Article 67 review. In granting the accused's petition for extraordinary relief, the Court expressed its view that it has the power to supervise the administration and operation of the entire court-martial system.

9. In United States v. Ledbetter, 25 USCMA 51, 54 CMR 51 (1976), the Court held that the defense at an Article 32 investigation may require the attendance of witnesses, rather than the use of their sworn testimony. Attendance

of distant witnesses at a preliminary investigation is costly, time-consuming, and unnecessary. One feature of the next comprehensive legislative package should cure the problem.

10. In United States v. Thomas, 24 USCMA 228, 51 CMR 607 (1976), and United States v. Roberts, 25 USCMA 39, 54 CMR 39 (1976), the Court produced three divergent opinions on the admissibility of evidence discovered in an inspection of barracks using a marijuana detection dog. These cases have promoted delay and uncertainty in the administration of military justice and, in view of Judge Perry's impending departure from the Court, further confusion may be expected.

11. In United States v. Hedlund, 25 USCMA 1, 54 CMR 1 (1976), the Court held that there was no jurisdiction to court-martial a service member for the off-post robbery and kidnapping of another service member. In so holding, the Court abrogated a principal developed in its own precedents that the victim's status as a service member was sufficient to establish service connection. See, e.g., United States v. Camacho, 19 USCMA 11, 41 CMR 11 (1969).

12. In United States v. McCarthy, 25 USCMA 30, 54 CMR 30 (1976), the Court overturned United States v. Becker, 18 USCMA 563, 40 CMR 275 (1969), and its progeny to the extent that they recognized a paramount and distinct military interest in drug abuse by service members sufficient to make out service connection.

13. In United States v. Grunden, 25 USCMA 327, 54 CMR 1053 (1977), the Court held that failure to instruct on evidence of uncharged misconduct was error, even though the defense expressly requested that no such instruction be given.

14. In United States v. Alef, 3 M.J. 414 (CMA 1977), the Court found the specification formats in appendix 6, Manual for Courts-Martial, 1969 (Rev.), inadequate to show military jurisdiction and established a requirement that, in all future cases, regardless of the nature of the offense, the Government must affirmatively allege within sworn charges sufficient facts to demonstrate the jurisdictional basis for the trial of the accused and his offenses.

15. In United States v. Booker, 3 M.J. 443 (CMA 1977), the Court stated, by way of extensive dicta, that summary courts-martial were to be limited to disciplinary actions concerned solely with minor military offenses unknown in civilian society.

APPENDIX II

EXCERPT FROM OFF THE RECORD SETTING FORTH NAVY JAG'S OPINION
OF THE COURT OF MILITARY APPEALS' DECISIONS IN THE CASES OF
UNITED STATES V. CATLOW, 23 C.M.A. 142, 48 C.M.R. 758 (1974)
AND UNITED STATES V. RUSSO, 1 M.J. 134 (C.M.A., 1975)

SOURCE: Enclosure (14) from "Off the Record", Issue No. 72,
13 March 1978, and official publication of the
Office of the Navy Judge Advocate General, Washing-
ton, D.C.

solicitation of each potential contributor by designated keymen. Navy support of fundraising events must be limited to specifically authorized campaigns. Navy support of other fundraising efforts is not authorized. This rule is rooted in the recurring theme of not doing for one what we cannot do for all. The Department of the Navy does encourage its personnel to participate in the fundraising activities of deserving entities but only in their private capacity during non-duty hours. Further, such private efforts may not be conducted as an officially sponsored command project.

5. Summary. While applicable regulations do not prohibit DoD personnel from participating in the activities of private associations in their purely personal capacities, personnel must avoid acquiring an affiliation or interest that conflicts or appears to conflict with Government interests. Participation as an official of the Government is strictly limited. So long as these base-line distinctions are recognized, most problems will be avoided.

VOID/VOIDABLE ENLISTMENTS

The Commandant of the Marine Corps requested the opinion of the Judge Advocate General on various questions concerning the effect of the Catlow/Russo decisions upon the status of military personnel. The Judge Advocate General, relying, in part, on Ms. Comp. Gen B-189465, of December 16, 1977, responded, in substance, as follows:

1. The Judge Advocate General has previously expressed the opinion that the decisions of the Court of Military Appeals discussing "void" enlistments are applicable only to the military justice issues specifically addressed, and "that the determination of the validity of a particular enlistment remains the sole province of the administrative discharge authority." The Judge Advocate General has not previously addressed the issue of whether recruiter misconduct creates a new category of void enlistments which the administrative discharge authority must take into account in determining the validity of a given enlistment. For the reasons expressed below, it is the opinion of the Judge Advocate General that it does not and that the law, in areas other than that

involved in trials by courts-martial under the Uniform Code of Military Justice, remains unchanged.

2. The Supreme Court long ago established the rule that, absent a condition which would preclude an individual from changing his status, such as insanity, idiocy, intoxication or infancy, the voluntary taking of the oath of allegiance changes the individual's status from civilian to soldier. In re Grimley, 137 U.S. 147 (1890). The Court held that:

. . . unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed. [Id. at 153.]

The test the Court established for determining the validity of an enlistment was first, whether the individual possessed the capacity to enter into a change of status and second, whether he did so voluntarily. Once these two factors are found to be present, the validity of the enlistment is conclusively presumed. Only the existence of an "inherent vice" in the relation, or a "natural wrong in the manner in which it was established," rises to the level required to disturb the relationship. The Supreme Court gave meaning to these two phrases in Grimley itself. With regard to the first the Court made specific reference to "insanity, idiocy, infancy, or any other disability which in its nature, disables a party from changing his status or entering into new relations." Id. at 152-153. As to the second the Court spoke of "duress, imposition, ignorance or intoxication. Grimley was sober, and of his own volition went to the recruiting office and enlisted. There was no compulsion, no solicitation, no misrepresentation. A man of mature years, he entered freely into the contract." Id. at 151. In the first instance, the Court referred to an actual lack of capacity to enter into a change of status. In the latter, the Court referred to the element of free choice, or voluntariness. Significantly, what the Court held did not affect the validity of the enlistment were matters of eligibility, even when prescribed by statute.

A naturalized citizen would not be permitted, as a defence to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the State or Territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the Constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void. [Id. at 153].

Grimley himself was five years past the maximum statutory age when he enlisted. His enlistment was held to be valid, not because of his false representation as to his age -- a factor which the Court may or may not have considered sufficient to prevent him from repudiating his enlistment as a matter of contract law -- but, more significantly, because his enlistment created a change of status which, absent a lack of capacity or free choice, must be conclusive as a matter of public policy.

3. Eighty-five years later the United States Court of Military Appeals held in United States v. Russo, supra,

. . . that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute . . . the resulting enlistment is void as contrary to public policy. Hence the change of status alluded to in Grimley never occurred in this case. [Id. at 23 USCMA 513, 50 CMR 652].

The Court of Military Appeals did not attempt to reconcile its reliance on "common law contract principles" with the Supreme Court's test for determining the validity of an

enlistment, i.e., that, absent a lack of capacity which would preclude an individual from changing his status, the voluntary taking of the oath of allegiance changes the individual's status from civilian to soldier. Private Russo suffered from no lack of capacity to enter into a change of status but from "dyslexia, a mental disorder which severely impairs an individual's ability to read. . . ." Id. at 23 USCMA 511, 50 CMR 650. He "sought out an Army recruiter in order to enlist voluntarily in the service." Id. Under the facts and under the law expressed in Grimley, Private Russo's enlistment was unquestionably valid, notwithstanding the fact that Russo was not qualified under Army recruiting regulations to enlist because of his inability to read. It was the added element of "recruiter misconduct [which] amounts to a violation of the fraudulent enlistment statute" which caused the Court of Military Appeals to hold the resulting enlistment to be "void as contrary to public policy."

4. The decisions of the Court of Military Appeals are dispositive as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice. McPhail v. United States, 24 USCMA 304, 52 CMR 15 (1976). The UCMJ, however, has no application to enlistments in the naval or military service. Compare, 10 U.S.C. § 801 et seq. with 10 U.S.C. § 501 et seq. (1970). Thus, the question of whether the presence of recruiter misconduct voids otherwise valid enlistments must be analyzed in terms of law applicable to administrative decision-making and the civil courts. The 1890 decision of the United States Supreme Court, In re Grimley, supra, is one of the leading cases in the area of military law. It has been cited consistently over the years for a number of different principles of law, the most pertinent here is that enlistment is a contract which involves a change of status like marriage; which status remains unchanged until dissolved by proper authority. This principle of law has been restated substantially without change to the near present. See e.g., Wallace v. Chafee, 451 F.2d 1374 (9th Cir. 1971). Cf. Bell v. United States, 366 U.S. 393 (1961), United States v. Williams, 302 U.S. 46 (1937). Cases relating to the creation of the enlistment status are less frequent but have also adhered to the rule first stated in Grimley. "It is the actual enlistment, the oath of allegiance, that changes the status from a civilian to soldier." United States v. Union Pac.

R.R. Co., 249 U.S. 354, 359 (1919). See also, Wallace v. Chafee, supra, at 1379. Finally, the test for determining the validity of an enlistment -- capacity-in-fact coupled with the voluntary taking of the oath -- has never been overturned. The civil courts have never held void an enlistment merely on the grounds that the enlistee was not eligible in some respect, with or without recruiter misconduct, with the single exception of enlistments entered into by applicants below the minimum statutory age. The decisions in these cases treat the minimum statutory age as a legislatively declared test of mental competency and declare enlistments entered into below it void. Hoskins v. Pell, 239 Fed. 279 (5th Cir. 1917). The Court of Military Appeals in United States v. Blanton, 7 USCMA 664, 23 CMR 128 (1957) and the Comptroller General in 39 Comp. Gen. 860 (1960) have adopted this rationale. All of these decisions are consistent with Grimley because they are grounded upon a lack of capacity to enter into a change of status. It is not merely the fact that the individual is not qualified by statute to enlist that is dispositive in these cases, but the additional fact, added by judicial interpretation of the statute, that the individual has been legislatively declared incompetent by reason of infancy, which causes the enlistment to be void ab initio. For the contrary view see the dissenting opinion in Hoskins v. Pell, supra; Ex parte Hubbard, 182 F. 76 (C.C.D. Mass. 1910); In re Cosenow, 37 F. 668 (C.C.E.D. Mich. 1889).

5. As noted earlier, the Court of Military Appeals relied on common law contract principles to void Private Russo's enlistment. While it is correct that an enlistment is a contract, it is more than that. "An enlistment is not a contract only, but effects a change of status." In re Morrissey, 137 U.S. 157, 159 (1890). The law applicable to contracts of enlistment is not the same as that applicable to contracts of private employment. United States v. Williams, 302 U.S. 46 (1937). The government-soldier relation is distinctly and exclusively a creature of federal law; and common law principles, which have evolved chiefly in litigation between private individuals, are not dispositive. United States v. Gilman, 347 U.S. 507 (1954); United States v. Standard Oil Co. of California, 332 U.S. 301 (1947); see also McCullough v. Seamans, 348 F. Supp. 511 (E.D. Cal. 1972). In light of these authorities, statements in some recent federal decisions that the validity

of enlistment contracts are governed by general principles of contract law [see, e.g., United States ex rel. Roman v. Schlesinger, 404 F. Supp. 77 (E.D.N.Y. 1975) and cases cited therein at 85] are simply incorrect. The Supreme Court has consistently held to the contrary that common law principles do not apply to the government-soldier relationship. Further, the cases cited by the Court of Military Appeals for the proposition "that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute . . . the resulting enlistment is void or contrary to public policy," do not support the proposition for which advanced. A typical statement from the cited cases reads as follows:

It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . .
Steele v. Drummond, 275 U.S. 199, 204 (1927),
quoting Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 334, 356 (1853).

Thus, it is the legality of the object which the contract proposes to effect, and not the circumstances surrounding its creation, which the court is addressing in the quoted language. Further, the common law courts have been reluctant to "void" a contract unless the degree of illegality is great. The following language seems clearly pertinent:

Where wrong committed by violation of statute is merely malum prohibitum and did not endanger health or morals and statute imposed penalties for its violation by way of a fine or imprisonment, additional punishment by way of refusing recovery for goods sold, by contract, should not be imposed unless legislative intent is expressed as such, or appears by clear implication. [14 Williston on Contracts § 1630B (3d ed. 1972)].

This principle would apply, for example, to a contract between an applicant for enlistment and a recruiter to provide the applicant favored treatment; such a contract

would not be enforced by the common law courts, but the enlistment itself would not be effected. There exists no reason to believe Congress intended to establish a nexus between the statute punishing unlawful enlistments, Article 84, UCMJ, 10 U.S.C. § 884, and those statutes governing enlistments in the Armed Forces, 10 U.S.C. §§ 501 et seq.

6. It is accordingly the opinion of the Judge Advocate General that the presence of recruiter misconduct does not void an otherwise valid enlistment, absent conduct which rises to the level of "a natural wrong in the manner in which [the enlistment] was established." Grimley, supra, at 153. A violation of Article 84, Uniform Code of Military Justice, 10 U.S.C. § 884, a general intent offense requiring only knowledge of an applicant's disqualification [Manual for Courts-Martial, 1969 (Rev.), par. 146] in itself does not rise to the level required by the Supreme Court to invalidate or, more precisely, to prevent a change of status. Therefore, only for the purpose of the Uniform Code of Military Justice does recruiter misconduct which amounts to a violation of the fraudulent enlistment statute result in a "void" enlistment.

7. Remaining for discussion is the effect of the Catlow decision [United States v. Catlow, 23 USCMA 142, 48 CMR 758 (1974)] on enlistments from the administrative viewpoint. In Catlow, the Court of Military Appeals held, in pertinent part, that enlistments resulting from a choice between serving a lawful sentence imposed by civil courts and enlisting in the Armed Forces is void at its inception. The court said:

Such action constitutes 'an insurmountable element of coercion.' [Citation omitted]. Unlike Grimley, therefore, this accused did not of his 'own volition . . . [go] to the recruiting office and' enlist; and, there was in the situation confronting him, unlike that facing Grimley, an 'inherent vice' that affected his acquisition of the status of a member of the Army. . . . We conclude that the accused's enlistment was void at its inception. [Id. at 23 USCMA 145, 48 CMR 761].

The court prefaced its conclusion with citations to one Supreme Court opinion and two circuit court of appeals decisions. All three are criminal cases dealing with either consent to search, or the entry of a guilty plea. None had to do with the presence or absence of duress in the civil sense as it relates to the creation of contracts and to other civil transactions, where the general rule is said to be that duress may exist whenever one, by the unlawful act of another, is induced to perform some act under circumstances which deprive him of the exercise of free will. 25 Am Jur 2d Duress § 1 (1966). It is also said that, "[u]nder all the authorities, ancient and modern, the act or threat constituting duress must be wrongful." Id. § 3. In a federal court decision closely on point the United States Circuit Court of Appeals for the Third Circuit had no difficulty in upholding the validity of an extension of enlistment where a service member on trial in Japan on charges of rape and robbery, had to elect between extending his enlistment and forgoing the benefits extended a member of the Armed Forces charged with crime by the Japanese civil authorities. The member had elected to extend his enlistment and had subsequently deserted. His petition for a writ of habeas corpus was denied because the court found "that his choice of custody with the Armed Forces as against commitment to jail in Japan was a voluntary act willingly done for his own benefit." United States ex rel. Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970). This view is consistent with an early decision of the United States Supreme Court dealing with the effect of duress on a civil transaction wherein it was said:

Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress. [Baker v. Morton, 79 U.S. (12 Wall.) 150 (1870) (emphasis added)].

It is, accordingly, the opinion of the Judge Advocate General that a choice between lawful alternatives, including imprisonment when lawfully imposed, is not the coercive "inherent vice" the Supreme Court was referring to in the Grimley decision and that, accordingly, the Catlow decision is also limited in its effect to questions of courts-martial jurisdiction under the Uniform Code of Military Justice.

8. The inquiry giving rise to this opinion also asked the following specific questions:

(a) Question: Must the findings of fact by the military judge be given collateral estoppel effect on the administrative determination of the status of the enlistment contract?

Answer: The ruling of the military judge is not res judicata on the discharge authority. The same rationale applies to the concept of collateral estoppel; however, in view of the foregoing opinion, the question is moot. The ruling of the military judge is relevant only in that it may have determined that the member is not a person subject to the Uniform Code of Military Justice.

(b) Question: Assuming that a discharge authority concludes that there has been either a coerced enlistment or a fraudulent enlistment effected with recruiter connivance, is the discharge authority free to either (a) take no action, or (b) decline to void the enlistment assuming the defect is waivable?

Answer: The presence or absence of recruiter misconduct is immaterial. What action the discharge authority should take depends upon the regulations of the service concerned. Either case will usually be subject to processing as either an erroneous or a fraudulent enlistment. For an example of a truly coerced and therefore void enlistment see United States ex rel. Norris v. Norman, 296 F. Supp. 1270 (N.D. Ill. 1969).

(c) Question: May the discharge authority decline to void the enlistment, over the accused's objection, or is an affirmative request for "retention" required?

Answer: An affirmative request for retention is required only to restore the individual's amenability to the Uniform Code of Military Justice. A member could be retained whether or not subject to the Code.

(d) Question: How long does a Catlow-Russo enlistment not having been authoritatively determined to be void, remain in effect?

Answer: The enlistment remains in effect until it would normally expire. This result is consistent with the Comptroller General's view regarding fraudulent enlistments except that the Comptroller General requires affirmative action be taken to waive the fraud before the enlistment may be considered valid for purposes of pay and allowances. The use of appropriated fund support pending resolution of the administrative processing involved in determining the validity of the enlistment and the disposition of the individual is authorized as are continued payments of pay and allowances. See, e.g., 54 Comp. Gen. 291 (1974).

(e) Question: What is the status of an enlistee who objects to waiver of the defect? Must the enlistee be released?

Answer: The member's voluntary request for retention concerned the procedure necessary to restore a member to courts-martial jurisdiction. A member who objects to his retention would remain a member but would not be subject to the Uniform Code of Military Justice during that enlistment.

9. The international law aspects of the status of Catlow/Russo enlistees will be determined with reference to the provisions of the applicable bilateral or multilateral international agreement, if any (whether a status of forces agreement, MAAG-type agreement, or the Vienna Convention on Diplomatic Relations, etc.), or customary international law in the absence of an applicable agreement.

JAG:131.1:TDK:ado Ser 13/5019 of 13 Jan 78

APPENDIX III

COPY OF NAVY COURT OF MILITARY REVIEW DECISION
UNITED STATES V. NORDSTROM NCM 77 1728
DECIDED 30 MARCH 1978

SOURCE: Official Records, U.S. Navy Court of Military Review,
Washington, D.C.

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C. 20370

IN THE U. S. NAVY COURT OF MILITARY REVIEW

BEFORE

JOHN P. DUNBAR

J. H. BAUM

J. A. MALLERY

UNITED STATES

V.

DAVID O. NORDSTROM, Jr., 262 37 2946, Seaman Recruit (E-1),
U. S. Navy

NCM 77 1728

PUBLISH

DECIDED 30 March 1978

Sentence adjudged 3 June 1977

Review pursuant to Article 66(c), UCMJ

of Special Court-Martial convened by Commanding Officer,
Naval Air Station, Jacksonville, Florida

LT Philip G. Cohen, JAGC, USNR, Appellate Defense Counsel
CAPT Geoffrey D. Fallon, USMCR, Appellate Government Counsel

DUNBAR, Senior Judge:

Appellant was charged with, and pled guilty to, Articles 80, 85, 92, 95 and 134 of the Uniform Code of Military Justice. A single specification was alleged under each Article. He was found guilty of the charges and specifications in accordance with his pleas; however, after findings, the military judge dismissed the charges laid under Article 92, UCMJ. Appellant was sentenced to be discharged with a bad-conduct discharge, to be confined at hard labor for 100 days and to forfeit \$248.00 pay per month for 3 months. Pursuant to a pretrial agreement, the convening authority approved the sentence but suspended confinement at hard labor in excess of 70 days for the period of confinement and 6 months thereafter. The supervisory authority approved the sentence as approved and suspended by the convening authority.

Appellant now asserts the following specific Assignments of Error:

I

THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, BY ADMITTING IN AGGRAVATION PROSECUTION EXHIBIT 4, SINCE IT FAILS TO STATE A SPECIFIC OFFENSE. UNITED STATES V. ROBERTS, No. 77 2094 (NCMR 8 DECEMBER 1972).

II

THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, BY ADMITTING IN AGGRAVATION PROSECUTION EXHIBIT 6. UNITED STATES V. BOOKER, 3 M.J. 443 (CMA 1977).

III

THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING IN AGGRAVATION PROSECUTION EXHIBITS 1, 3, 4 and 5.

I

Appellant states that Exhibit 4, a record of nonjudicial punishment admitted in aggravation at his trial, fails to state a specific offense, thereby rendering it inadmissible. The exhibit indicates on its face a violation of "Article 92, UCMJ, Derelicty (sic) In Duty." We find the offense sufficiently described to ascertain its true nature and also distinguishable from the case cited by appellant, United States v. Roberts, No. 72 2094 (NCMR 8 December 1972).

II

Of the five records of nonjudicial punishment introduced into evidence, appellant asserts that the one incurred at a shore activity, Prosecution Exhibit 6, should have been excluded from consideration pursuant to United States v. Booker, 3 MJ 443 (CMA 1977).

United States v. Booker, supra, held that an individual must be told of his right to confer with counsel before he "opts" for disposition at the Article 15, UCMJ, or summary court-martial level. This is supported by reasoning that the consequences of a decision to accept an Article 15, UCMJ, or a summary court-martial disciplinary action involve due process considerations, i.e., waiver of the right to a full adversary criminal proceeding with its attendant Fifth and Sixth Amendment protections, and that only a legally trained person can supply the requisite quantum of information necessary for an informed decision.

Therefore, the crux of appellant's second assignment of error is that if Booker is retroactive, then evidence of a prior nonjudicial punishment administered at a shore station should not have been admitted in evidence because appellant was not told of his right to confer with counsel. We will not go into the question of Booker's retroactivity because it is presently under consideration by this Court sitting as a whole in the case of United States v. Harrell, No. 77 1628 (NCMR ____). Nevertheless, assuming without deciding, that there is merit to appellant's assignment and that the record of the one prior nonjudicial punishment incurred at a shore station should have been excluded pursuant to Booker, we are of the opinion that appellant was not substantially prejudiced by admission of this exhibit, and that, even conceding he were, such prejudice could be corrected by our reassessment of the sentence.

III

Appellant also argues that records of four nonjudicial punishments, Exhibits 1, 3, 4 and 5, are inadmissible because the nonjudicial punishments were administered aboard ship, where, by law (Article 15, UCMJ), he could not refuse them as he might if stationed ashore.

While appellant agrees that those exercising the command function need the disciplinary action provided under Article 15, UCMJ, and assumes arguendo that there are compelling reasons for requiring members attached to or embarked in a vessel at sea to involuntarily forego the fundamental right to a judicial hearing, appellant argues that introduction at a court-martial of records of Article 15, UCMJ, punishment which could not be refused is improper. He submits that the admission of these exhibits is: (1) violative of equal protection principles which are encompassed

in the Fifth Amendment's due process clause, citing Mathews v. DeCastro, 429 U.S. 181 (1976) and Schneider v. Rusk, 377 U.S. 163 (1964); (2) contrary to the reasoning of the United States Court of Military Appeals in Booker, *supra*; and (3) contrary to the intent of Congress (Chief Judge Ferguson in a concurring opinion in United States v. Johnson, 19 USCMA 464, 42 CMR 66 (1970), citing authorities in support of his belief that Congress did not intend for nonjudicial punishment records to be used as matters in aggravation at courts-martial).

The difficulties arising from Booker, relating to admissibility at courts-martial of nonjudicial punishment records incurred by shipboard personnel who may not refuse Article 15, UCMJ, punishment, have been discussed competently in United States v. Lecolst, No. 77 1808, MJ (NCMR 15 February 1978). In Lecolst, the majority stated:

We do not find the statutory distinction between service members who are attached to or embarked in a vessel and those who are not to be violative of the equal protection principles encompassed in the Fifth Amendment's Due Process Clause. Persons attached to or embarked in vessels are treated differently from all other service members insofar as the latter have been afforded the right to demand trial by court-martial in lieu of nonjudicial punishment under Article 15, UCMJ, while the former have not. Statutory classifications are not per se unconstitutional; the matter depends on the character of the discrimination and its relation to legitimate legislative aims. Mathews v. Lucas, 427 U.S. 495, 503, 504 (1976).

Therefore, Lecolst stands for the proposition that, constitutionally, there is nothing objectionable in Article 15, UCMJ, providing that shipboard personnel cannot refuse nonjudicial punishment although shore based personnel may. In other words, there is no violation of equal protection principles. We agree. This appears to be a reasonable statutory classification to meet the unique problems of shipboard discipline.

However, to say that an accused at sea has no right to refuse Article 15, UCMJ, punishment differs from saying that, in light of Booker, the record of the punishment, which could not be refused, can later be introduced as evidence in aggravation at a court-martial. Previously, the shipboard individual and the shore-based individual shared the same legal position vis-a-vis the admissibility of prior nonjudicial punishment records. If, however, the exclusionary rule described in SECNAV 9640/012307Z Dec 77 (hereinafter ALNAV 073/77) is applicable to Article 15 hearings, we most likely may anticipate that many commands ashore, for practical reasons, will not want to interject such concepts as the right to confer with independent counsel and the written waiver, described in ALNAV 073/77, into Article 15 proceedings.

Consequently, it may very well be that many persons appearing at nonjudicial-punishment hearings of shore stations in the future will not have to feel any concern that their wrongdoing will later be introduced against them in a subsequent court-martial. The dissent in Lecolst intimates, rightfully I think, that Booker will ultimately create unfair and unjust rules with regard to introduction in evidence of nonjudicial punishment records. 1/

Therefore, although we sense future evidentiary complications as a result of Booker, we must hold at this time that admission in evidence of records of shipboard nonjudicial punishment does not violate the due process clause of the Fifth Amendment and is neither contrary to the intent of Congress nor the reasoning in Booker, as best we understand that decision. The third assignment of error is not concurred in.

Our disposition of appellant's assignments of error in this case does not in any way address the larger, indeed, the fundamental, issues posed by this and numerous other cases in which Booker has been cited as controlling authority. Therefore, it seems appropriate to briefly confront and discuss some of these issues at this time to insure that there is no misunderstanding concerning this Court's assessment of that opinion.

1/ It also appears likely that any accused, by choosing to confer with independent counsel, can most probably defer his Article 15, UCMJ, hearing for a protracted period. But, does this not subvert the fundamental military purpose of an otherwise speedy and informal proceeding?

As was pointed out in the concurring opinion in United States v. Williamson, 4 MJ 708 (NCMR 1977), we at the appellate level must grapple candidly with radical changes taking place in the area of military law. Whether or not we agree with these changes, we have no authority or desire to circumvent or to ignore the mandates of the Court of Military Appeals despite implications to the contrary. ^{2/} We do have a duty to make discriminating, critical, and level-eyed analyses of questionable opinions and to register our objection to them, when warranted, in the decisions we hand down. This may require considerable insight and the ability to look backstage, so to speak, in an effort to determine the motives and the emotional attitudes behind the military High Court's reasoning in a particular case: e.g., Booker. This is not to say that the sincerity or integrity of the High Court is being challenged.

The opinion rendered in Booker has established substantive changes in procedures connected with nonjudicial punishment and summary courts-martial. That these changes have been received with considerable mental reservation and puzzlement by the military legal community cannot be denied. There appears to be some justification for this reception. What the recent and controversial cases of United States v. Elmore, 24 USCMA 81, 82-83, 51 CMR 254, 255-256, 1 MJ 262 (1976) (Fletcher, C.J., concurring) and United States v. Green, 24 USCMA 299, 52 CMR 10, 1 MJ 453 (1976) lacked in clarity and accuracy of expression, Booker seems to lack in logic and meaning. In fact, I think it can be fairly stated that it is quite certain that few, if any, military lawyers,

^{2/} In the text of a speech entitled, "Where the Court of Military Appeals is Going in the COMA Evolution," The Chief Judge of the High Court states that:

The Court [of Military Appeals] avoids hard and fast procedural implementation of its opinions applicable to all branches of the services - believing as we do that there are differences in the branches and the fine tuning is best done by the individual services. We do not believe that ignoring our decisions or attempting circumventions of our decision is fine tuning.
[Emphasis supplied]

after reading Booker, have a truly comprehensive view of the course that military justice, both in spirit and in practice, is following. Consequently, the unreasonable differences between the legal prescriptions and proscriptions by the Court of Military Appeals in Booker and the interpretations and evaluations thereof by a great number of military lawyers have, in my opinion, become a matter of serious concern. 3/ Moreover, as lawyers, I think we should all feel a sense of shame for the confusion of legal issues and the loss of the clear meaning of words that the opinion in that case has thrust upon command personnel responsible for the proper administration of military justice within the services. 4/

This Court is not opposed to change. But I think most legally trained persons in the military establishment have a sense that both the integrity and the value of their legal system flow from responsible, painstaking, and sensible construction, stone upon stone, by mature and dedicated legal minds of the military. Those who have gone before demonstrated at least some familiarity with and sensitivity

3/ In the February 20, 1978, issue of Navy Times there appeared a reader's opinion submitted by a general court-martial trial judge, Colonel R. Eleazer, USMC, along with an editor's comment, as follows:

Read with interest the article by Tom Philpott in your November 28 issue in which he reports an interview with Chief Judge Albert B. Fletcher Jr. of the U. S. Court of Military Appeals. I must question whether the Chief Judge in fact made the comments attributed to him, for such comments would reflect a misunderstanding of the military justice system and the purpose of military law. (Reporter Philpott stands by his story as being correct and that all of Chief Judge Fletcher's comments were accurately reported -Editor.)

4/ Booker, when read in conjunction with ALNAV 073/77, would lead the average person, whether lawyer or layman, military or civilian, to conclude that military law has become a kind of legal madhouse.

to the military mission and the realities of precisely what procedures, legal or otherwise, are best calculated to further that mission. This, I believe, accounts for a natural tendency in the military establishment to resist, and regard with suspicion, "innovators" and "advanced thinkers" - except where their legal and military credibility and professional soundness have been unquestionably established.

Booker appears to be a perfect example of the point I am trying to make. That decision is based upon the United States Supreme Court opinion handed down in Middendorf v. Henry, 425 U.S. 25 (1976). But, any attempt to make a methodical analysis of the innovative rationale contained in Booker in conjunction with Middendorf appears to baffle even the steadiest of legal reasoners. In the inferences the Booker decision draws from Middendorf, there is always a selective emphasis, a glossing-over of some part and apparent distortion of a portion of another (regrettable practice in appellate advocacy - inexcusable practice in appellate opinion writing) in order to reach what the concurring opinion in Williamson, *supra*, described as "made-in-advance conclusions"; and the parts selectively emphasized always seem in close connection with the particular interest and apparent presupposition of the Court of Military Appeals that counsel should be provided at summary courts-martial.

I think it can be reasonably said that the majority of military lawyers would agree that the Booker decision is simply a pseudo-rational manipulation of the contents of Middendorf. It smacks of a sort of youthful, one-sided idealism aimed at providing every protection conceivable for military wrongdoers; an idealism devoid of the slightest realization that the services might have a stake in the matter, or might be entitled to the reasoned assurances of the Court of Military Appeals that the disciplinary interests of the military services have been given due consideration.

Booker, for all its leaky logic, seems to say essentially that, henceforth, except where counsel was validly waived by the accused, counselless nonjudicial-punishment proceedings cannot be introduced at courts-martial to aggravate (increase, but only within established limits) any punishment otherwise authorized. Additionally, except where counsel was validly waived by the accused, prior counselless summary courts-martial may not be introduced at a subsequent court-martial to enhance (increase, but only within established limits) or escalate (exceed the normally established limits to include

a punitive discharge and additional confinement and forfeitures) any punishment otherwise authorized.

This decision overrides and repudiates long-established provisions of the Manual for Courts-Martial, United States, 1969 (Revised edition), which permitted the use of records of nonjudicial punishment and summary courts-martial for the purpose of aggravating, enhancing, and escalating punishments.

The ultimate determinations of the Court of Military Appeals in Booker seem to emanate from that Court's preoccupation with particular words and descriptive phrases contained in Middendorf, from which the military High Court draws broad, sweeping and abstruse conclusions. The point I wish to make is that Booker purports to be the first-born child of Middendorf. Here, however, I think the line must be drawn, at least as far as the judicial integrity of this Court is concerned. If we legitimize Booker by passively accepting it, without protest, as representative of communicable and credible legal reasoning, then, in my opinion, there can be no further honest thinking in military law.

I do not agree with the Court of Military Appeals that Middendorf, supra, at 38-39, officially redefined and recharacterized the summary court-martial from a "criminal proceeding" to a "disciplinary hearing." Realizing that the UCMJ cannot be equated to a civilian criminal code, the Supreme Court does not appear to have been the slightest bit interested in redefining summary courts-martial. Such a claim by the Court of Military Appeals is simply not in accordance with the case. The Supreme Court merely noted, for purposes of discussion, the unique characteristics of the summary court-martial. Accordingly, this Court specifically rejects as inaccurate and misleading the assertion by the Court of Military Appeals that the Supreme Court redefined summary courts-martial. I might point out that to the extent that a summary court-martial is a disciplinary hearing, so is a special court-martial and so is a general court-martial. The encouragement and maintenance of military discipline are what the UCMJ, nonjudicial punishment, summary courts-martial, special courts-martial, and general courts-martial, indeed, the entire military justice system are all about!

Furthermore, the objective of that system is not shared by any civilian justice system in this country, since unquestioning obedience, strict regimentation and sacrifice of

the interest of the individual for military objectives are neither necessary, desirable, nor relevant concerns of the civilian justice system. In the military, however, these concerns constitute the indispensable conditions of an effective fighting force. They require a unique justice system. The Constitution, the Congress, the President, and the Supreme Court recognize and sanction this requirement. The Court of Military Appeals, however, in such cases as Booker, continues to resist and to persist in the view that the protections found as essential in the civilian sector must necessarily be interfused with those found in the military.

Therefore, whether a summary court-martial is a criminal proceeding, in the civilian sense, or a so-called disciplinary proceeding, in any other sense, is wholly irrelevant in evaluating its function and utility in the entire military justice system. The Court of Military Appeals' narrow over-reliance upon mere word symbols, to reach in-depth conclusions, is nowhere more manifest than here.

Moreover, I seriously question, by what prerogative, and for what compelling reasons have the traditional, workable, seemingly-just principles relating to the admissibility of nonjudicial punishment and summary court-martial records been peremptorily abrogated? I cannot accept as credible the Court of Military Appeals' statement that it has a "command" from the Supreme Court to ensure due process at such hearings and is therefore obligated to repudiate the provisions of a long-standing executive order specifically designed to insure due process. Are we to understand that due process was lacking in all the tens of thousands of court-martial cases that have utilized non-judicial punishment and summary court-martial records pursuant to the evidentiary provisions of the Manual for Courts-Martial?

Particularly illustrative of the Court of Military Appeals' intransigence in this area is the statement in Booker that:

It is in order to give some meaning to the due process guarantees of the Fifth Amendment that we must provide limitations on the utilization of evidence of the imposition of discipline at a summary court-martial in a subsequent trial. Those hearings in which

the accused was represented by counsel, or has executed a valid waiver of the assistance of counsel may be used for the purpose of enhancement of punishment since the basic concepts and Argersinger, [Argersinger v. Hamlin, 407 U.S. 25 (1972)] will have been met. [Id. at 448-449 (Emphasis added)].

The emphasized portions of this statement appear sharply at odds with both the Supreme Court's holding in Middendorf that the due process guarantees of the Fifth Amendment do not require that an accused be afforded counsel at a summary court-martial, and its statement in that case, at 36-37, that:

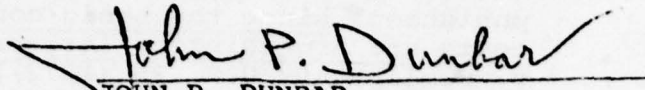
If we were to remove the holding of Argersinger from its civilian context and apply it to require counsel before a summary court-martial proceeding simply because loss of liberty may result from such a proceeding, it would seem all but inescapable that counsel would likewise be required for the lowest level of military proceeding for dealing with the most minor offenses ... But we think that the analysis made in cases such as Gagnon 5/ and Gault, 6/ as well as considerations peculiar to the military, counsel against such a mechanical application of Argersinger.

Obviously, the Supreme Court indisputably has declared that neither the due process guarantees of the Fifth Amendment nor Argersinger apply to engraft any counsel requirements whatever to the summary court-martial process. Why then does the Booker opinion purport to be guided by the dictates of the Fifth Amendment and Argersinger? In light of logic, the law, and plain common sense, this Court strongly urges the Court of Military Appeals, in its reconsideration of Booker, to overturn its prior holdings in that case.

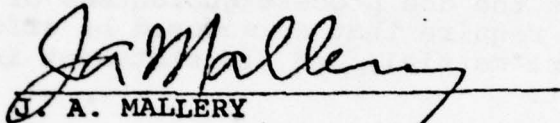
5/ Gagnon v. Scarpelli, 411 U. S. 778 (1973).

6/ In re Gault, 387 U. S. 1 (1967).

Subject to the foregoing, the findings and the sentence, as approved below, are affirmed.


JOHN P. DUNBAR

Judge MALLERY concurs.


J. A. MALLERY

BAUM, Judge (concurring in the result):

I would affirm the findings and sentence because I believe evidence of shipboard nonjudicial punishments are admissible for sentencing purposes and I do not believe United States v. Booker, 3 MJ 443 (CMA 1977) applies retroactively. I agree with the general thrust of Senior Judge Dunbar's opinion as well as his conclusion that Booker should be overturned, but I would confine the comments to a discussion of the breach by the Court of Military Appeals of its obligation to follow the law as enunciated by the United States Supreme Court.

United States v. Booker, while purporting to apply the Supreme Court's decision in Middendorf v. Henry, 425 U.S. 25 (1976), has, in fact, contravened it by perpetuating a requirement for counsel at summary courts-martial. The Court of Military Appeals, in addition, has gone on to create new prerequisites for both summary courts-martial and nonjudicial punishments never even hinted at in Middendorf v. Henry. The new imperative for counseling from lawyers before an accused can opt for nonjudicial punishment or a summary court-martial is not required by Middendorf v. Henry and will surely result in delays that can rob these proceedings of their promptness and their effectiveness. Furthermore, to the detriment of both accused and command alike, the Booker decision has severely restricted the power of commanding officers to refer suspected offenders to the lowest possible adjudicating authority, by arbitrarily imposing a limitation

on the subject matter jurisdiction of summary courts-martial and nonjudicial punishment. Not one of these new rules for summary courts-martial and nonjudicial punishment was mandated by the Supreme Court. In fact, they are not even alluded to in Middendorf v. Henry, and surely are contrary to the spirit of that decision.

A look at the background leading up to United States v. Booker, may shed some light on the enormity of the decision of the Court of Military Appeals in that case. Booker was precipitated by Middendorf v. Henry, which in turn had been spawned by the United States Navy's stand on the applicability to the military of an earlier Supreme Court decision, Argersinger v. Hamlin, 407 U. S. 25 (1972). In Argersinger the Supreme Court had held that the Sixth Amendment to the United States Constitution required appointment of counsel for indigents before confinement could be imposed, even in misdemeanor cases. The Navy said that the Argersinger holding was inapplicable to the military, particularly with respect to summary courts-martial. This position was promptly challenged in Federal Court and ultimately appealed to the Supreme Court. Meanwhile, prior to that Court's ultimate resolution of the matter in Middendorf v. Henry, the United States Court of Military Appeals ruled in United States v. Alderman, 22 USCMA 298, 46 CMR 298 (1973), that Argersinger was applicable to the military and found constitutional requirements for providing counsel at summary courts-martial. The conclusions of the Court of Military Appeals in Alderman have been clearly and unequivocally rejected by Middendorf v. Henry, which held that the requirements of Argersinger did not apply to the military summary court-martial, that there was no Sixth Amendment right to counsel in summary court-martial proceedings and that Fifth Amendment due process requirements were also met without a separately appointed counsel acting exclusively in an accused's behalf at a summary court-martial. In so ruling, the court noted the various protections afforded in a trial by summary court-martial, including the requirement that the summary court-martial officer safeguard the interests of the accused. Now, in the face of the Supreme Court's clear position on this matter, the United States Court of Military Appeal's has, in the following language, declared itself outside the reach of our highest court:

It is in order to give some meaning to the due process guarantees of the Fifth Amendment that we must provide

limitations on the utilization of evidence of the imposition of discipline at a summary court-martial in a subsequent trial. Those hearings in which the accused was represented by counsel, or has executed a valid waiver of the assistance of counsel may be used for the purpose of enhancement of the punishment since the basic concepts and protections of Argersinger will have been met. 1/

Furthermore, although Alderman is never mentioned in Booker, the Court's failure to renounce that earlier case, coupled with the above quote, certainly indicates that Alderman is still considered valid law by the Court of Military Appeals. Added to this is the fact that the United States Court of Military Appeals has, after two years, still not specifically answered the question of Alderman's continued viability, which was certified to it by the Judge Advocate General of the Navy in March 1976. 2/

One is led inevitably to the conclusion that the Court of Military Appeals has consciously chosen to disregard the United States Supreme Court on this matter. In taking this course, the Court of Military Appeals has failed to follow its

1/ United States v. Booker, 3 MJ 448 and 449.

2/ United States v. Redmond, NCM No. 76 0006 of 23 February 1976, certified for review to the Court of Military Appeals by the Judge Advocate General of the Navy on 29 March 1976 pursuant to Article 67 (b)(2), Uniform Code of Military Justice on the following issue:

Was the United States Navy Court of Military Review correct in its determination that the military judge and reviewing authorities erred prejudicially by considering evidence of the accused's two prior convictions by summary court-martial, United States v. Alderman, 22 USCMA 298, 46 CMR 298 (1973), in light of Middendorf v. Henry, ___ U.S. ___, (March 24, 1976)?

The Court of Military Appeals subsequently affirmed Redmond, without opinion, citing only United States v. Booker, 3 MJ 443 (CMA 1977), No 32,049 (CMA October 18, 1977).

own stated modus operandi when in disagreement with the Supreme Court. In United States v. Sims, 2 MJ 109 (CMA 1977), the Court said, "we must be content to express any misgivings or disagreements in opinions, which, nonetheless, conform in disposition to the holdings of the Supreme Court. 3/ Just the opposite tack has been taken in Booker. Lip-service deference has been given to the Supreme Court while refusing, in fact, to conform to its decision. This message comes through loud and clear at page 445 of Booker where the Chief Judge states, "with proper deference to the Supreme Court," and then goes on in footnote 13 to cite published criticism of the Supreme Court's decision in Middendorf v. Henry, along with problems he sees associated with the fact that a summary court-martial officer is a "lay person", and then concludes with this statement:

It is these factors coupled with our evaluation of the overall ramifications of Middendorf which compel this decision as to the use of summary courts-martial.

Thus, it appears that the Court of Military Appeals, in disagreement with the conclusions in Middendorf v. Henry, felt impelled to a decision that would modify its results.

Up to now there has never been a direct appeal to the United States Supreme Court from a decision of the Court of Military Appeals and no sanctioned procedure for such an appeal is readily apparent. Necessity, however, is the mother of invention. The Court of Military Appeals would do well to carefully consider the ramifications of its flagrant departure from a Supreme Court decision. Abuses of power inevitably provoke reactions which can undo valuable and important changes that have developed. I, for one, would hate to see the many good things advanced by the Court of Military Appeals swept aside in a broad Legislative or Executive reaction to cases such as Booker. Hopefully, the Court of Military Appeals in its present limited reconsideration of Booker 4/ will see the wisdom of renouncing its prior

3/ Id. at 112, n.8

4/ The Court of Military Appeals on November 28, 1978 granted a petition for reconsideration of Booker for the limited purpose of considering:

Whether summary courts-martial should be limited to disciplinary actions concerned solely with minor military offenses unknown in the civilian society. 4 MJ 137.

action in its entirety and act accordingly. Otherwise, since the United States Supreme Court deemed the questions posed in Middendorf v. Henry important enough for review and resolution by the highest court in the land, it might very well consider an inferior court's decision to distort and pervert that ruling ample reason to exercise its supervisory jurisdiction over that lower United States Court by entertaining a petition for a writ of mandamus, 5/ just as the United States Court of Military Appeals has felt compelled to take extraordinary action in the exercise of its "supervisory function" when the circumstances so required. 6/



J. H. Baum
J. H. BAUM

5/ Ex parte Bradley, 74 U. S. 364 (1869).

6/ McPhail v. United States, 1 MJ 457 (CMA 1976).

APPENDIX IV

REMARKS BY CHIEF JUDGE ALBERT B. FLETCHER, JR.,
U.S. COURT OF MILITARY APPEALS, ON 22 MARCH, 1978
DURING THE 8TH AIR FORCE WORKSHOP

SOURCE: Copy provided author on 12 May 1978 by Criminal
Law Division, Air Force JAG, Washington, D.C.

REMARKS BY JUDGE ALBERT B. FLETCHER, JR.
8th Air Force Workshop - 22 March 1978

(These remarks were made informally, and because of poor reproduction quality and the fact that often several people were speaking at once, they had to be edited somewhat. These remarks are, therefore, produced for your background information only and should not be quoted.)

Because it is a workshop, I don't have any formal--I'm not going to put any startling revelations out so that General Reed will go home in shock as he usually does after I speak. But I would like to make some comments on what I've heard here, and some things that the Court has noticed. Particularly from the government's viewpoint. And I like the point the young gentleman made yesterday. "You do have a client, and it is the government, and it's important that you express on behalf of the government the obligation that you find is there." Someone else suggested--and once again when we look at the records, the "I think" does not encourage an Appellate Court, but "the government has proven" really sets the tack, and we do watch it. The record, if I was to say anything for government counsel, make us a record. As Mr. Reagan knows, how many times the Court will look down from the bench and ask a question and both Appellate branches find themselves in a position of saying the record does not disclose, so make a record. Because quite frankly, gentlemen and ladies, when we write we do go over the record. In fact, in our office, in our Court, the record is gone over completely three times, so the record is very important.

Some Specifics: In Dunlap and Burton cases, government, do not stipulate the sequence of time. Put your--if you have witnesses or explanations, set it all out. A great example of that, I believe, though I was a dissent, is Henderson, and there's one following called Callavera, which will be out the door before long, and once again you will see it. The stipulation, from the stipulation we can tell nothing except time sequence, and if there are extraordinary circumstances--quite frankly, stipulation just does not set it out for us. In the Goode area, personal opinion first. I think Goode is bad law. It is the law of the court. Comply with Goode. The cases are coming down. If they're not out the door, you'll see them soon, that strict compliance--Goode has become a strict compliance law. There is very little escape that's based upon waiver, and Goode is complied with, and the counsel does nothing.

Instructions: I want to go back to this, because I think the burden is heavy upon the government counsel to submit instructions that are drafted with as much specificity without commenting on the evidence as possible, to be presented to the trial judge. These become part of the record, gentlemen, and we look at them. It also gives us some citations into some of the thinking of the government. While I'm there, I don't know whether they do this or not, and I must rely upon you gentlemen. But, I don't know whether it's the practice to submit trial briefs or not. I gather it isn't because I've never seen one in a record. Judge, do you get any trial briefs? What I call trial briefs--submitted to you prior to the case?

Judge Kautt: No we do not.

Judge Fletcher: If you have the type of case where a trial brief--where the case is difficult, I would suggest a trial brief. I would suggest you present it to the judge. It becomes part of the record, and it certainly enlightens an Appellate Court as to your theories and concepts, which we can then supplement. And actually make logic at times out of the record itself. If you are a defense counsel, I would suggest the same thing. We're having a great deal of trouble with the Charge Sheet, and you've talked about it today. I would--it's not for your considerations, and I'm sure this would come through The Judge Advocate General--I think the Court believes that there should be a change in the Charge Sheet. That most of the information that is on the Charge Sheet is not really relevant to the charge itself, and that there should be more of a formal indictment or information which is handled as in the civilian community, and that the information otherwise could be supplied on whatever form you want. But this seems to be a trend, and if you'll notice I believe it's--I don't remember case names--I'll have to rely upon my brother judge here, Bill Early, on names. I believe it's Alef that sets out the requirements on the Charge Sheet. And we're looking to this. This doesn't mean a detailed jurisdiction statement. It does mean sufficient information that we can arrive at as factor. One other thing: I think you're missing a golden opportunity. Maybe this goes back to the record. Assume, now this may be difficult, when you're faced with the trial judge. But assume that the trial judge knows nothing about the law. Because that's the record that comes to three civilian judges, who probably do not have the detailed knowledge of the law that the trial judge has. So you may have to be over-explicit. You may have to set out in finite, some propositions, and the judge may look at you like, "What the hell's wrong with you, I know this, I've been doing it for 20 years." We haven't. And remember! In a criminal proceeding, you just start the race at the trial level. The finish line is at 5th and E northwest. So you've got to carry the whole complement through. In the--we talked about Veracalle. I want to comment on apparently a practice used here where the--if I understood correctly, the Staff Judge Advocate to General Lawson goes in. But the presentation is made by a young counsel, I assume has tried the case, or has the responsibility in this area. I think it's tremendous. I think it gives him an insight into command and responsibility of command that many counsel do not have. Or it appears to us do not have. I have stated that I thought, and I'm probably wrong in this, but I would like to see every young counsel who practice in the court-martials spend two years in the field--not in the area of law, before he starts practicing, so he would have the concept of command. I'm sure this might drop down some of your recruiting practices in the law area though. I really want to answer your questions. I want to talk about what you're interested in here. These are just the comments that I've picked up sitting here for this very short time I've been here. Any area you want to discuss, I wish you would bring up, and if not, the group told me this morning they would like to hear my philosophy of the law. I think you can read that. Maybe you can't understand it because I don't have quite the comic mind that Pat Williams does, but I do find some of my opinions funny two months later. No applause. So if there's any particular area --yes, Pat?

Q: We're all concerned in the area of movement of witnesses. Getting back to the Carpenter case, where the opinion said explicitly that if the witness' testimony is material he must be brought. Now this comes down to some difficult questions where we have a trial at Incirlik, and the defense counsel requests 38

different witnesses, all of whom are going to testify to the accused's good character. All 38 of them. And there doesn't appear to me, in any of these cases, to be a point where you can reasonably draw the line and say now wait a minute. You know you're only going to get four, you're only going to get five, you're only going to get six, but you're not going to get 38. Is there-- can you elucidate on that?

Fletcher: Yes, well you know, Carpenter was written by Judge Cook, and he later said he didn't say what he said. We now have Willis--I can't think of the other case involved. I think if the rule of reason--the trial judge has the primary responsibility in the request for witnesses. Thirty-four witnesses, I think, is ridiculous on the matter. I don't think you can set up a hard and fast rule--that's why the court hasn't gone to this quite frankly. Because we have found that if we would say, all right five witnesses is the maximum, all of a sudden--with due respect to those who put out regulations--five witnesses becomes the reg. And there are times when you could have witnesses which would testify to different propositions which is material. I would bring all these matters--as a trial counsel, quite frankly, I would not decide the question. Sooner or later the court's going to strike hard in this area of the request to trial counsel for witnesses by the defense counsel. My thinking is that when this happens there's going to be trial counsel go down. That's my present concept. So I would certainly bring the matter--if the request is made of you, I would go into the judge and have a 39a session, if I'm correct in my designation, and let the judge decide. The judge, with reason, should certainly not have duplicity or multiplicitous testimony. There is no hard and fast rule.

Q: You would agree that there is some point where reason would prevail here, where you could cut off the request? It wasn't really that apparent from the Carpenter decision. There was a point where you could deny the material witness because he was cumulative.

Fletcher: I showed this on the basis of my own writings. Law must be reasonable or it will fail. I think this is an area we anticipate reason. Materiality is part of the test. Now there is a modification of the Carpenter test on the way. I can't tell you the name of the case right now. I frankly don't remember it. But, even with materiality, there's a point of reasonableness, and I know of no court that just lets them go on and on forever. Even in the civilian communities such as California--it's become very very liberal in this area.

Q: There's a few areas I'm interested in. One is neutrality of the Base Commander and the SJA's role in search warrants. The other being in regard to the Jenks Act. Specifically with regard to the Base Commander's position as to the detached and neutral person he's supposed to be in issuing warrants. How do you perceive the SJA's role in advising him? Is this role limited to advising him of that nebulous standard of probable cause, or actually giving him advice as to whether or not there is probable cause?

A: Well, we have a case on the search warrant coming out the door in the next three weeks, and I fear to answer the question because it happens to be a three-opinion case. I think it's safe to say that no one on the court believes that the commander cannot be neutral and detached as to search warrants. The conditions that take him out of that particular category are numerous. Now when you get to the SJA, I think the SJA has an obligation under the Code to advise the Commander of the standards by which he must reach the decision. I would hesitate

to guess what the court would do where it was shown that the SJA reached the decision and it was rubber-stamped by the Commander. I have the feeling I know, but we have Reveria that came out the door--wait, is Reveria out the door? All right, then we have this neutral and detached as to gate searches, there's a case called Harris, which is on its way out the door as to Intercontinental. But as I say, the broad concept is that command can be neutral and detached in these areas. Is the Jenks Act case out yet, Bill?

A: No sir, not that I know of.

Q: The question on the Jenks Act that I have sir, is in the adoption and use of the ABA standards vs. Circuit Court Opinions, what is the Court's position in what is necessary under the Jenks Act to be given to the defense counsel with the wide variety of opinions by the different circuits, the 5th Circuit being with recent case thing they don't have to give FBI the 302s, which are witness statements that are not specifically signed or adopted by the witness versus other circuits--the 2nd Circuit--that are pretty liberal in that you've got to give them just about everything.

A: We had a case coming out, but I think it's safe to assume that the present court would lean more toward the 2nd Circuit.

Q: A more liberal interpretation?

A: No, I would not say a liberal interpretation, no. I would never condemn Al Fletcher.

Q: Back to jurisdictional allegations on the Charge Sheet, do you visualize those requirements as requiring allegations on cases involving purely military offenses on the one hand such as AWOL, and secondly, any kind of detailed analysis on cases happening on a military installation, for ease, on a military installation of exclusive federal jurisdiction?

A: No, I see no problem. I don't think you have to have any allegation except the facts, whether on base and your AWOL for instance.

Q: It seems to me that an AWOL specification in and of itself sets out the proper allegations in that it says the man was a member of the military and committed an offense basically only a military member can commit, which is AWOL.

A: Yeah, that costs a double jurisdiction, and what you're going into is the in personam jurisdiction. The facts themselves, which is AWOL, or on base, after Relford should be sufficient without any further statement. And I believe that somebody has a reg out--I don't know whether it's the Air Force or not. Somebody has, maybe it's the Navy has a reg out on that area. Any other areas that you're interested? Yes?

Q: I have a question concerning sentencing. Some civilian jurisdictions are moving toward mandatory sentencing--does anybody in the panel, or yourself sir, know of any move or discussions along that line? For military, on certain offenses?

A: Panel? I know of none. While we're doing the sentencing, let me express an opinion which is probably contrary to your thinking. I am very opposed to giving judges sentencing authority. Now this may seem strange, since I'm the one who is allegedly judicializing the system. Let me give you my reason. I'm convinced that command has got to have the ultimate authority to decide who stays in his command and who is not in his command. I'm not sure that a judge, with due respect to the trial bench, is qualified to do this. So,

I'm bucking apparently a major trend, because this seems to be the leaning. And it also seems to be the way that military justice is moving. Although there's quite a movement afoot, I believe the New York Bar also would give to the trial judges the writ powers. This frightens the hell out of me quite frankly, and I would limit them only to coram nobis really. I'd not give them any other writ powers. I just make this point. Any other questions?

Q: Just to start with, as a lead-in, could you--reducing it down to the base level where we have to apply a lot of this philosophy, would you tell me exactly what your view of decision in the Roberts case is? That is, using dogs in marijuana searches?

A: Well I can tell you how I read the Roberts case. In so saying that, I'm excluding that I'm speaking for Judge Perry who wrote the lead opinion because that is, once again, a three-opinion case. I went back to my Thomas opinion. I believe, as I read it, that Roberts does not foreclose the use of dogs. That's the lead opinion. We're talking about the lead opinion. I do not think that Thomas or Roberts, as I read it--I'm one vote, forecloses the use of dogs for marijuana, searches, inspections, shakedowns. It is all part of the package of personnel readiness. Now maybe I've just taken a bunch of semantics and moved them around here. I'm not--I'm sure I'd have a second vote on that concept from Judge Cook. As long as we're in an open area, I believe that's the one restriction that Bill puts on it. I'm not saying that is what Judge Perry says. In fact, I think if the opportunity arose again, he would buy Ferguson's opinion. I'm speaking what I think--he would buy Ferguson's opinion in Thomas. You see, Thomas did not preclude the use of dogs. It only, in my opinion, specifically admissibility, Cook's opinion would have admitted it and Ferguson said it wasn't worth a tinker's damn to start with. So, does that answer your question?

Q: Well, let me --as I understand your view, you're capable in your own mind of distinguishing between a search and an inspection?

A: I'm not sure I am, but I think I have to.

Q: So, let's present a hypothetical.

A: Is it on its way up?

Q: No sir, I can't get anything past the trial level.

Q: If a commander, two weeks in advance, gave you the schedule to inspect a barracks, not open bay, but consisting of individual rooms, two men to a room. In each room an expectation of privacy. Let's take the first example--they go right through on an inspection type thing, using the dogs. Every room - nobody is singled out for suspicion, and this thing has been scheduled two weeks in advance. You produce marijuana. In your opinion, is that evidence admissible?

A: No, per my Thomas opinion. Because you see, my preface remarks is that this is part of a personnel readiness inspection. If I understand your facts correctly, you're running this dog through only for the marijuana.

Q: Well, let's say only for drugs. I don't--now, had the--let's leave the dogs out and say the Commander and the first sergeant went through in the same way and turned each room, drawers, closets, the whole bit, as an inspection. And you discovered marijuana?

A: I think under the Plainview Doctrine it could be admissible, if your facts are right.

Q: Now we aren't talking about Plainview. We're talking about ---

A: Well, wait, you're carrying on an inspection and you open a locker.

Q: Yes.

A: Which you have a right. In the locker is a bag of Wonderbread which has green stuff in it, or something like this, is what you're saying. I'm assuming?

Q: Yes. Only if, for example, they went through--they carried through with them metal detectors, and it revealed a submachine gun hidden in the woodwork. Does this change?

A: No.

Q: I don't understand--it seems to me---

A: Now under my theory of Thomas, it doesn't.

Q: It seems to me that the Court is hung up on the mere fact that there's a dog. Why does the dog convert an otherwise proper inspection into a search requiring ---

A: I don't think it does convert a proper inspection.

Q: Is it possible to have a proper inspection with a dog?

A: Yes, I think so. I'm one vote gentlemen. I'm giving you my thinking only at this point. Because that goes back to your original question. I think it is proper. I think it can be done, yes. Yes, I think the evidence under, what I call a personnel readiness inspection, could be used.

Gen Reed: I think you have to characterize the inspection that you've scheduled two weeks in advance as something more than just looking for marijuana in every room in every barracks. This is part of discipline, it's part of training, it's part of equipment check, it's part of other kinds of contraband, and if you take the dog--certainly, the presence of drugs is a part of the training readiness inspection process. And I think what's happened is, drugs have been the center thing, and that's the only thing that has been revealed that is the purpose of the inspection. When you do that, then you cloud and you detract from the real inspection process.

Judge Early: In Roberts we said that was a search.

Fletcher: We were sort of locked in on that.

Q: There was never a satisfactory discussion, I thought, between a distinction between a search and an inspection. But didn't I understand you to say that in the scenario that I gave you that you would not admit the evidence?

Q: I think the scenario you gave him, he was thinking this whole thing was for drugs.

Q: No, and the reason I said two weeks in advance was because you couldn't

possibly ---

A: Let me maybe straighten this out in my mind. As I view what would be a personnel readiness inspection. If any of you heard me in Europe, I think I did this. Taking your two weeks notice, let's say. Let me add I'm not sure that's a prerequisite, but knowledge may be. You set out a series of things that you are going to look at to see if the personnel can meet the line requirement. And if one of those series happens to be narcotics, in my present state of mind, you can use a dog. But you've got to go ahead and look for all, whatever else makes a man ready to fulfill his function. If that throws you off, based upon anything I've written, please speak up. Bill, am I way off?

Judge Early: No, in Roberts, there is a hint that they were looking for hotplates and illegal heaters. But the basic facts presented in Roberts, and we don't really know completely, was that they were looking for drugs. The Army had a case where they were looking for illegal firearms, and that's what they wanted to look for, and the question was how can you say that's an inspection? It is in the broad former military sense of the word. But if you go in and look to see that socks are five-deep in the drawer, and the hangers are hung back against the wall, and the uniforms are in one locker--I think what Judge Fletcher would say is, if, as part of that inspection, looking for socks, hangers, and uniforms, you are also saying you cannot have marijuana in your barracks, you could use a dog to search out to see if they were violating your instructions.

Q: Now, as I understood it, he was saying socks, hangers, marijuana, contraband, da to da da da - as they bear upon readiness.

A: You see now I hadn't thought about socks and hangers because I didn't know you looked at them anymore. Now I was thinking more about cleanliness, which I think gives rise--fire, fire hazards, this type of thing, which I don't know if you have clean socks makes you get to the line quicker or not.

Q: A number of socks.

A: Yeah, if you have three in one I'm going to worry about it. And if that's important for discipline, then I would say yes, I don't want to make light of it. If that's a disciplinary concept.

Col Rosa: I wonder if I could say something here? We're in the Strategic Air Command, aren't we, almost all of us? Out here we've got B-52s and KC-135s--those are aircraft. We have alert facilities where people pull duty. They've got living quarters in those facilities--they're on 24 hour duty for various shifts. Living quarters, B-52s, what are they carrying? We don't even have to mention it. On their off-duty time they've got quarters here outside the flightline--a real secure area. But these same people that pull duty up in here--now you can translate this same thing into our missile bases. Now, what is an imminent threat to public confidence in the Air Force, the SAC ability to perform its very critical mission? The reliability of these people

whether they're working on the aircraft, putting in radar equipment--what have you. It relates to missiles, weapon systems, and that's where we get hung up, as military people, on this attempt to distinguish inspections and searches. So that's where we need some discussion and clarification and getting down to the hard knob of--is there a distinction between a man--can you draw a valid distinction between my duty and my off-duty time, I don't know. Maybe in the case of the lawnmower operator, you can draw those distinctions, but can you draw them as to a crew member, as to a radar technician?

A: I think in Roberts--in fact I think the first sentence in the last paragraph says that military inspections is a well-known exception to the Fourth Amendment. And then it goes on and talks about shakedowns--shakedown is the word that Perry uses--a shakedown inspection. You're getting into another area which is interesting, and I'm sure has a direct effect upon Strategic Air Command, is the jurisdiction--the off base type thing--the readiness situation.

Q: That was a corollary, and that's what Col Kosa . . . If, as you say, narcotics has a direct corollation to readiness and justifies search in a barracks or where someone lives with an expectation of privacy, why wouldn't it have that same sort of relationship to the person who lives 100 yards off the base? Because the man's going to be just as strung out whether he takes dope off the base or on the base?

A: That is a very persuasive argument. Read a case called Hessler, which will come out in about two weeks. Although it is on base, you should give serious consideration to its application and the concept expressed in off base, and I really can't say anymore at this point in that area.

Q: Let me try to give an example of what we're talking about. We have a missile base located out in a town called Knobnoster, Missouri. It's 70 miles from Kansas City, there is no really effective law enforcement agency anywhere around the base. Missile maintenance people have possibly, possibly not so, appeared to be screwing up little things, a little bit more than perhaps was done in the past. The types of things they're doing appear to be related to possible use of marijuana and other drugs. We are in the mainline at Knobnoster, one of the main lines in the United States, for narcotics. One of the dumping off places for narcotics is Knobnoster, Missouri, right outside the gate. We can't get the DEA to bust their main line, that they're working on for our sake at Knobnoster, can't get the local people to get interested in the situation. Furthermore, they'd be stopped by DEA. What do we do to assure that we don't have a bunch of pot-heads working on these nuclear weapons that are in the missiles outside in the base area?

A: Well, let me make a suggestion, and I'm not saying what the outcome would be yet at CMA. If you have the situation where you do not have the interest and you can show this, of prosecution, let's say for minor amounts of marijuana in the civilian community, or whatever the drug happens to be. I think you can get this on the record because we're talking about the 12 criteria in Relford; one of them is the availability of a civilian tribunal. Or even

law enforcement. You've got to even go to more basics than the 12 criteria, you've got a total lack of law enforcement--desire to proceed. Now I will say, with all honesty, I think it's going to be damn hard to get it on the record. Because they're not going to ever admit that they're not interested in the drug.

Q: Perhaps statistics - -

A: Could be. Take New Mexico for instance. We have a case pending now where New Mexico has legalized marijuana, and the military has just tried an airman or air person, I don't know which, for marijuana off base.

Q: One might also send the local DA a letter asking if he will prosecute and then he will respond to the letter probably.

A: Good idea, good idea, show this.

Q: You've got to get them caught first, and his problem is there's no agency ---

A: I don't know what DEA is, what's that?

A: Drug Enforcement Agency.

A: Oh, O.K.

Q: From your remarks, I sort of gather that the cases that some of us have read is saying that off-base possession in the use of marijuana is not service-connected. Possibly it has to be taken in light of maybe we didn't put enough on the record to get it service-connected, such as this man is a missile crew member who works 24 hours a day, to be called in, or whatever. And that because of those things we believe we have jurisdiction. Is that a fair statement that possibly with more on the record an off-base possession or use of marijuana could conceivably be service-connected?

A: Yes. And there is a case, I can't tell you, it may be one of yours, of two--once again I can't tell you the name, its two military policemen, off-base and dealing in a military unit. Watch for it, I can't tell you the outcome. I think my time's up, unless you have more questions. Yes, Judge?

Q: One question is a broad one. Philosophically, do you conceive the military, that justice and discipline are mutually exclusive?

A: Yes and no. I'll answer the question because I do have definite feelings on that. You no longer hear me speak of the military justice system, and your Judge Advocate General well knows, I speak now of the military judicial system and the discipline system. I think the purpose for the two systems, although I know I'm breaching 200 years of military concept, is different. I think one looks toward removal, and that's the military judicial system, and one looks for rehabilitation for line use, which is a discipline system.

I would divide them at the Summary Court and Article 15. These would be my disciplinary tools, and the special court and general court would be the military judicial tools. I don't think they are mutually exclusive because I think you've got a bad law, which I would like to see changed. I'm very opposed to the removal section, which you can remove from an Article 15 to a summary, up to a special, which keeps the link in there. In fact, if I could sit down and rewrite the Code immediately, and I press for this, as once again General Reed knows, I would eliminate the summary totally. I would make the Article 15 not removable, making it a totally disciplinary tool to the commander. I would make the military judicial system-- I would eliminate command from the military judicial system, except in three areas, which would be preferral, referral, and suspension or parole. So you see in my long-range plan they're exclusive of each other, but I'm practical enough to know that I still have that linkage. I really don't believe that to say I'm going to send you to a special court is going to make a Marine run up a hill with gunfire. But I think there are other ways, if that man can be rehabilitated to the disciplinary system, to do this. And leadership plays a tremendous part. Once again, I would compliment you on your command here--I've seen it throughout Strategic Air Command--

Q: Does the Appellate Court have the right to inject those thoughts into the system?

A: Right to inject them?

Q: The idea of the theory of the distinctions?

A: I don't think we have a right to do anything about them legislatively. I think we can consider it that, and I think if you read the article--once again, correct me--I believe in Juris Doctor. that Judge Perry actually speaks of the two systems. We're saying that discipline we will not become involved in which is the Article 15s and the summary, but we will look toward the justice system. Which is interesting. Maybe you don't know this, if you don't keep up, the majority of the court of which I was not a party, just issued a writ in an Article 15 case--in fact about 30 of the damn things--I think--21? O.K. Under the total concept of the justice system, those will be heard at the end of April, but this is under the McPhail concept. I believe that's the theory behind this. As I say, I am the dissent, I voted to dismiss the petitions. So, as you say my friend, the expansion that we have bootstrapped ourselves into, I don't think it can take us quite to the point of legislation, but you can see the extent that we are considering and hearing argument on the possibility that we have some type of supervisory authority over Article 15s. And you might be interest to know--I don't know how I'm going to vote in the end. My reaction was to dismiss it because it is, based upon my theory of the division, the Article 15 cases that we're talking about--I'm not sure the orders show this--is whether Article 15 punishment falls in the purview of Relford and O'Callahan. That's what the cases are. These are off-base problems.

Q: Sir, perhaps another philosophical question: Several of us last night were discussing the apparent trend, not only in Court of Military Appeals but perhaps also in the Supreme Court, of justice taking on a greater importance in the area of form, vis-a-vis content. We seem to have come around to a position in justice where it's more important that we meet all

of the form requirements than it is to decide whether or not an individual is guilty or not. Taking a look specifically at how little it takes to get a case reversed. We spent several days here discussing what the duties of a trial counsel are and how we can fulfill those duties, and how one little deviation can cause a reversal. Do you envision perhaps a reversal, or a change in that trend, not only in a Court of Military Appeals, but in other federal courts?

A: Let me put it this way. I think you'll find in most Appellate Courts as it is with the Supreme Court, and I hope it is true with the Military Court of Appeals--you will find a rigidity to the Court's decision for a period after a decision has come down. Let me give you an example of this. Appellate Courts become very disturbed when you read our opinions and ignore the opinions. And in most cases, CMA particularly even more so than the Supreme Court will give you a clue, running at least 12 months to 18 months, before they come in with their hard and fast rule. And I would cite you the what we refer to as the Elmore-Green-King concept, where an initial opinion in Elmore as to going over the agreement was set forth at least 18 months, if not two years ago. Green came out and set forth the standard over a year ago before King came out. And then King came out and the Court became very rigid. Now this rigidity will leave, but until we have compliance, at either trial level or at--and as it happens in this area--CMR--there's no problem. Then the Court's going to be very rigid, and this is what the Supreme Court does, and this is what most Appellate courts do. Anytime form overcomes substance, we're in a hell of a mess. But for awhile you're going to find these periods. As you found--well Alef was another one of these --

Q: Ouch!

A: Does that answer your question?

Q: Yes, thank you.

Q: Judge Fletcher, when you become rigid, then the Air Force system, the Army system implements these forms and format to protect any reversal later, and you never get them out of the system anymore. And we've got them, these old, antiquated forms. That's not your problem.

A: I'm sure that's true, and once again--

Q: Well he can't, from his position, correct it.

Q: Well we have to be sensitive to the response that he's created. And there's some of these opinions that I don't understand, I might be dumb, you know, but I am the functionary.

Q: On Alef we found him guilty. On long Charge Sheets I'm setting out all criteria to protect us from ever it getting busted based on that issue.

A. We have really a difference in judicial philosophy here. I happen to cotton to the school, which apparently Henry wouldn't like. I will avoid, at all cost telling you directly what to do. I think you're a reasonable man, I think judges are reasonable men, and counselors--they should read and take it not as a hard and fast concept at any time, but to implement from it. Let me give you an example: Out of our court, I think the biggest abuse in this area is the Miranda after it was handed down, I think the Supreme Court was absolutely wrong in the method of setting down this hard and fast concept, and then it became ritual and it became meaningless for all practical purposes. You whip out the card and rattle it off and all that kind of rot. The other concept is, and I don't believe this but I've heard it since the day I came on the Court, you're dealing with the military--the only thing they'll understand is a direct order. I don't believe that, I don't believe that. So--and it's right to a degree--we will not lay down hard and fast rules, and I don't think we have since I've been on the Court, except for King and that was my baby. Frankly I was amazed. Yesterday I listened to some of your forms and procedures, and how you implement it we won't know until the case gets up there because we do not go out to see what you've done with it. I make another statement which I was reminded of the other day by a young ex-marine friend--now Air Force back here. It always seems to me when we come down with a rule that will get you to the fifty yard line that the military ends up over the goal post. This sort of frightens the hell out of me, but I don't know what to do about it. . . . You don't agree?

Q: Yes sir, I agree that sometimes the opinions coming out of confusion, particularly when there are three different ones--filled with footnotes referring to other cases that might or might not have footnotes, and it's very difficult, and I'm not so sure if you took a poll how many people in this room understood Roberts to mean what you say you think it means.

A: Only to me--only what Roberts means to me.

Q: You see if Roberts means to you what I think you said it did, providing that with Judge Cook, and we got an entirely different result at the practical level than what we thought we had. Because we had reacted, or I had, exactly opposite.

Q: Henry, I won't even say that you and I have reacted, but the judges have reacted, and I'm sorry if I'm stepping on anybody's toes, but essentially what's happening is the Court comes down with a ruling. We take at a higher level than you and I sit at, a very conservative view of that ruling. We aren't going to be busted. And what happens is we can't get it into trial. We've perceived it as the dog is an extension of the commander's nose, and obviously when the dog enters the room he's only there for one purpose and it's to find marijuana and, therefore, no matter how good the inspection may be, the entrance of the dog into the room has just busted it, and that's the way the judges will look ---

A: I'm fascinated that this conclusion can be reached. I can appreciate it why you have done it, but in Thomas there are two opinions which say you can use the dogs. One says the evidence is not admissible. That's Fletcher. Then you have Cook saying that you can use the dogs. Then you come along with Roberts, where once again we're back to the dog situation, because Cook is still at the same point. Fletcher is still at the same point, and Perry says--that's why I restrict it to me. Frankly, I don't know what a shakedown inspection is. Now I knew what it was when I read it. But I know that good brother judge is relying upon circumstances that he recalls during World War II, because since I was in Europe I've asked him what it meant. Because I had the same question that you're throwing at me. If we're talking only about convictions, yes there is an answer. Inspection, I think, with a dog alone under Thomas and Roberts, you aren't going to end up with the majority vote on the Court, because I'm going to exclude the evidence.

Q: Except as you said before, if it's--if that's just one part of the--

A: If it's all--if you've got the whole diamond ... a personnel readiness concept, and this is just one facet--Fletcher, I see I'm being taped, I may be printed and I'll deny it all. I've done that before and they still don't quote me right. I'm talking Fletcher--when you start tying me down I can only speak for one-third. But let's talk about three opinions. There's a bottom line in every opinion, there's a bottom line. Whether I write it or whether one of the other judges write it, I would suggest for you Veracalle for instance. The bottom line in Veracalle is Fletcher's opinion. There's just no question and subsequent action has shown this, that's it's Fletcher's opinion. I think the bottom line in Thomas is Fletcher's opinion. You can use the dog--it's not admissible under the fact of Thomas. It's not unusual to find cases out of other Appellate Courts, in fact it's not unusual to find a 10-opinion case out of the Supreme Court of the United States. They are not that rare, there are only nine people on it. But it happens. But there is always a bottom line. The case that CMR from the Air Force cited Goza v. Maylen. If you can find a majority for a damn thing in that case, with due respect that even in the headnotes they start citing who voted for what, because you can't tell. I think you'll always find a bottom line. Give me an example where you think you can't find a bottom line.

Q: I don't think I knew the bottom line in Roberts.

A: I think the bottom line in Roberts; frankly under the facts of Roberts it is still Thomas--Fletcher's opinion in Thomas.

Q: We know the bottom line now if we can get it through ---

A: No, you don't, you only know Fletcher's bottom line. I want to keep reminding you, get that on the tape. I'm not going to commit Cook and Perry to a damn thing. Anything else you want to know, you're supposed to be talking about prosecution?

Q: I would like to say, too--this is kind of important. In the series of jurisdictional cases, I think to me what you have said here is a revelation. And I think it is a revelation to many of the people who have given us guidance on it. Like you say, if the answer is, of course, -- I'm just a journeyman

lawyer down here at base level, but I am the journeyman you're speaking to. And some of these things I don't understand as you understand.

A: Well, the English language is a bad language interestingly enough to communicate in. It's the best we have. But let me give you an example of what I'm thinking about. Off the record in all senses. I think in jurisdiction cases, for instance, I think the only certainty out of McCarthy, Headland, Alef is that Beeker has been overruled. I think that you can draw the conclusions. Beeker is dead. From then on you've got the Relford criteria, you've got our subsequent decision, you've got our rejection in many instances of CMR opinions, which I think gives some clue. But there is no--I don't think there's any hard and fast rule in any of the cases I have stated, except that Beeker is dead. While we're on this, let me go to one other point because somewhere we are not communicating. This started in Headland, under Judge Perry, where he talked about--you recall Headland is a California case, and he talks about a conspiracy on base and a robbery in something off base. He says the conspiracy is triable by the military. As prosecutors and SJAs, consider if you have a case which you believe will fall in the purview of Relford and place it in the military jurisdiction, see if you have a conspiracy which you can charge on base. I think this is a growing trend. I think it's there. I had a revelation today, I was talking to your Judge Advocate General at lunch, and I haven't done my research on it. I guess I won't bring it up because I haven't done my research on it yet. I have another theory where you might circumvent or at least not run into a double jeopardy problem. I think that's the bottom line in the jurisdiction case.

Q: I'd like to hear your other theory, sir.

A: Well, I don't know, and I don't want to get in an argument, because frankly, I don't know. I brought this up to General Reed because of my interest in this area. I believe the example that we were talking about, and believe me there's a lot of communication between the Judge Advocate General and the Court--not as a coming in and woodshedding the Court, but they have the knowledge that we will never obtain, those of us on the Court. And the only way I could obtain this knowledge is to talk with gentlemen of the caliber of General Reed or Bill Early. I think the example was, that actually this young Lieutenant was caught off base with marijuana or something of this nature, and the civilians decided not to prosecute him. I have the question, and quite frankly I don't know and I haven't researched, I said to the gentleman well, is it possible where he's not prosecuted off base, is it possible to prosecute him under 134? I don't know. Well it's not possible then according to Bill Early.

Judge

Early: That was Carrillo--in Carrillo the man was picked up by a border search at that time legal, and he was brought before a federal grand jury ~~and then~~ *and is billed* ~~being~~, we don't know why, and then tried by the military. Maybe we should reconsider.

Q: Well actually, what you're saying is that really in the right cases we still have jurisdiction over some of ---

A: I thought you might, but I don't know, I just don't know.

Q: Well it all depends on how you set it up--jurisdictionally--what kind of showing you make on the record, for the attachment of that jurisdiction. And maybe we haven't worked hard enough and used the imagination that we're gifted with, I hope, to describe these cases properly.

A: They always speak of the imaginative defense attorney. I think your opportunities are just as great, and if you'll use your creativity--strikes a great flair in Al Fletcher's and Matthew Perry's and Bill Cooks eye--it's a white flag, not a red flag.

Q: Sir, I wanted to ask you, to find out some of your thoughts on the reforms you think the military justice system should undergo--changing the topic of conversation here a bit, but I'm interested in several that you think should be made.

A: Sush as?

Q: Plea bargaining for instance.

A: My reform is set out in King. Do you need anything more than that on plea bargaining?

Q: I was thinking you might expand on that.

A: Well, let me make one point here. I don't think you can separate Green and King from Care. They are totally intermeshed. But I really can't go any farther than I did in King, although there is a case coming out called Crumley which interestingly enough modifies King to a degree, mainly for the benefit of the CMR. We want to get them off our back. Ask me another one, I'm sorry I really can't go any farther than my philosophy as to--I think plea bargaining is an absolute essential if you're going to run your system. Now I know you have this very unique situation where it has to come up to somebody, and that's where you're going as--if anything I have great candor--I think you're wrong but it's not my business, nor is it my business to tell The Judge Advocate General of the Air Force in an opinion that he can't do it that way, nor would I.

Q: Sir, would I throw something your way, and this goes back --

A: I've been catching quite a few, go ahead.

Q: Last night you said we had one--this is paraphrasing what you said-- I guess we have one hell of a justice system, and I think F. Lee Bailey said that if he had his choice of going to trial he would prefer to go to trial under our system. Now we have built so many things into our system that are unknown, you know to the rest of the world, possibly have we done a dis-service to our community, starting with O'Callahan and stretching right on through the cases? And have you considered that we possibly have? I'll give you a very clear example: In New York State where I'm from, if I was an airman and I had a half pound of marijuana, I would much prefer, I would pray that I would be caught on base where I might go to Lowry or Fort Riley

four months or six months instead of getting caught in Plattsburgh, New York where I'm going to get six to life. In a foreign jurisdiction, even more so.

A: I think that's very true. For instance, if you take our 134 92-cases, I usually travel with counsel, but I've got my friend Bill here to correct me, as far as the defendant's concerned, those decisions were not favorable to the defendant because in most instances if you go to the -- (changed tape) proposals is that there be no automatic appeal from the court-martial to CMR and this be handled by a notice of appeal. I very much favor this. However, as we were discussing earlier, this is looked on as anti-defense, and, therefore, its chances of survival are probably very slight. This is a corrective measure. The Code just went too far initially because of the pressure of 16 million people, and I don't know how many of them wrote their congressman to do something about military justice. This often happens with legislation, instead of going to the middle point it went all the way.

Q: Incidentally, we were advised by the agenda formers that it's perfectly all right to go the way we are--that's sort of an open time.

A: Oh, damn it. Hang on, I love this. I love to communicate with counsel.

Col Kosa: This period was for general panel discussion, and I think we have an open hour right after lunch where we were going to have Major Hoppe or LoBurgio down from SAC Headquarters, but I think Al is probably packing his bags for Guam, so that gives us a little bit of lag if you'd --

Q: The question I have involves the actual holding of Relford. It's been our interpretation at this Headquarters that when we are writing advice to you that any offense on base is service-connected under the holding of Relford.

A: I agree.

Q: In that case, do you feel then that the jurisdictional basis needs to be alleged separate from the specifications of any on-base offense?

A: No, I don't.

Q: Is there some way we can get the word out to judges of this?

A: No. You can't take my word as gospel. Anything else?

Gen Reed: I'd just like to go back just a little bit. I think we left Roberts, for me, in a little bit of a state of confusion. And let me preface this as a comment-type question. As I understand the bottom line in Thomas-Roberts, there are -- the search inspection has been characterized in three different ways. You say there is the search kind of thing in which you have to have

probable cause before you can go in with the dogs, or however you go in, and you go in for the purpose of securing evidence with a view toward action trial by court-martial or other punitive measures. Then there is the inspection for the purpose of solving a drug problem. Say a unit has a drug problem. They don't know who is involved in the drug problem, but the commander "knows he's got it." He's involved downtown, he gets reports from undercover agents, but no evidence. He has to solve this problem. And he takes the dogs in going in as an inspection for contraband. And he does this with a view that such an inspection is useful, even though he knows in advance that he probably isn't going to be able to use any of the evidence discovered in a trial by court-martial. He cleans the place out perhaps of contraband. If he has people on Human Reliability he can take them off the job of handling sensitive matters, weapons, crewman, whatever, and one other thing flows from that and that is the Commander is protected from willfully and knowingly engaging in an unreasonable search which the court has said that probably is. And the penalties that a Commander has, or that any citizen has, for willfully violating the Constitutional right of an individual, he is protected. And then the other third element is the inspection that is scheduled whether or not announced for the purpose of readiness and has a litany of items that they are looking for, including narcotics and marijuana. And I think the confusion, as I see it, is there is a misunderstanding as to whether that middle item is a useful tool. And I don't know. I think that some people out here have to take a look at that and see whether or not it is useful to have the right to engage in inspections to solve, or at least to gain information about a drug problem in the barracks, knowing you cannot take punitive action, but you will identify people, secure the evidence, destroy it, and be protected against a suit for damages for Constitutional tort. That's how I have looked at it--the Thomas, Roberts, after listening to you tell me more about it on what you've read.

A: Now I would agree with your interpretation. But there are three. My experience has been in talking with command that they are not--what they tell me now--what they tell their lawyer may be something else, but they are not disturbed with the second one because their main concern is to get it out. And then to move it out again. And if they get their repeater, then there are other tacks they feel they can take. I don't want to comment on those.

Q: Back to the dogs. How about the common area hallway--walking the dog down the hallway is considered a common area that anybody has the right to be in. If you had a dog with you, I assume the dog has the right to be there, and he alerts you on a room on a door, and we will assume that the Base Commander is properly notified and knows all about the dog's training and all that kind of good stuff. Is that going to be--and to go in based on authority of search from the Base Commander on a probable cause because of the dog's alert, and they find marijuana in there. Let's let the dog go in because that's part of the search. Is the evidence found in there going to be admissible?

A: O.K. I can't answer the question. Read Hessler. Now let me say, Hessler is not a dog case. Hessler is a human case, but the application, I think will be the same.

Q: You perceive a difference though between entering the door and entering a locker? That one hangs us up.

A: I think you will find two interesting concepts in Hessler which has never been put forth and may relieve some of your minds in this particular area of search and seizure.

Q: Sir, do you care to make any comments on the step process required by Herd, whether or not, for example, a real serious offense with overwhelming evidence. Say murder one, whether or not the step process would have to be gone through, that is by restriction first as opposed to the climate where there is also strong evidence _____

A: Off the record, if X commits murder, I'm going to put him to jail. Now you can go through all the step processes you want, and I said if you went through it, it's almost a jury trial and a concurring opinion to arrive at that. We don't have any bonding authority, but we do have the inter-reliance concept which I think you've got a community concept. So I think if you've got--well, you know -- AWOL. Now if you've got a chronic AWOL, the law has got to be reasonable. You just can't put him out again, he's gonna go scooting off I assume. So the step-by-step process -- if you have a -- what Herd says, if you have a, what Herd says is that if you'll show up for trial and community and self-protection -- is Herd the three-fold test? So I do not think you have to start at the bottom. Al Fletcher does not think you have to start at the bottom and work up.

Judge Early: The underlying question is, do you have to try every step. O.K. you consider each step and then select the one that you think meets the situation.

A: Al Fletcher thinks you have to consider, you have to try though. You don't have to let it run away and bring you back the fifth time. I'm not sure I got a second vote.

Q: You don't seem to be the majority on the good stuff.

A: You know that's sort of the truth. You know, I've been characterized as a liberal and an activist -- Let me leave you with one thought. I want to touch on something briefly that I view happening, and I think you should be thinking about it. I see a change in the structure as it is set up now. I see a change coming about, and I'm not even sure it's going to take legislation to implement the change. I can see that the restriction, and you all see this part particularly, I can see the restriction of a command in the judicial process. And probably by either forcing a non-delegate--that he cannot delegate in some areas, the Court seems to be--the majority of the Court seems to be, forcing command to take other steps. Maybe he just doesn't have the time to complete all the things that are required of him to take. Tied into this I see a change in the SJA's role. And I think its coming very rapidly. I think one of the first steps was the independent defense. I think the independent judiciary, then the independent defense; I think you and I while I term on the court, I think we will see independent prosecutors section. I'm not saying its good or bad, because in my simple mind this seems very logical to me. I see the SJA, which I view as this group here, as becoming more corporate counsel. And in fact, looking down the road a great distance, I can see you totally out of military justice. Totally out of military justice. Now I want you to--this may seem like a hell of a shock to you, but you see there are other little tails that dove into this. For instance, under the Judge Advocate General's bill I happen to agree with it. It provides that command will only decide the probation and suspension. He no longer will decide the law and the questions of fact. Now my question to you is does he need a SJA for this particular purpose as he did for the three--the three-prong test? Not necessarily. This man can judge character, he can look at forms in the file. So I can see this movement, and I'm not saying I'm for or against. I merely think you should be cognizant from where I sit, that I view this picture.

Q: Sir, with your sensitivity, as I've seen it, of the need of the commander for discipline -- you're structuring all of this into the division of the Article 15 away from military justice aspect.

A: I'm a party to it. I can see it coming.

Q: The frightening thing to me and to the other people here, as I see it, is getting the commanders out of having some degree of control over the discipline of his force.

A: Oh, I think he has to retain control of those who are placed, kept, and sent away by the system. I don't think anyone would deny that at the judicial level. At the discipline level, I frankly think we have great trouble, logic-wise -- let me be very honest with you. I think if McPhail whipped around

again, if the facts in McPhail were to come zipping by, I think we are all so excited, I think we'd have one opinion out of the Court on McPhail. We really didn't give it the total study that it deserved. In fact, I think there's some great loopholes in its logic quite frankly, which if I get an opportunity, will write on. What I'm saying is, we would probably make some changes. Now this doesn't do you much good at your level, because McPhail is law, and it's still bubbling on as it happens. But another thing you'll find out about the Court, if the judge is wrong on the Court, he'll tell you he's wrong. And I think you've seen this in opinions. If you didn't read that I was wrong in Mosely and Veracalle, read it again. I was just wrong, and I think you'll find that -- I would suggest to you that possibly Booker might have some other considerations. Once again if you quote me, I'll call you a liar. I have no desire, quite frankly, I have no desire to separate systems. I have added unto that. My philosophy, and I can't express it too strongly. There has to be a military justice system. There just has to be. If anything I say suggests anything to the contrary, then you're misreading me. Thank you.

APPENDIX V

MEMORANDUM FROM THE NAVY APPELLATE DEFENSE SECTION
WASHINGTON, D.C. TO ALL NAVY AND MARINE CORPS
DEFENSE COUNSEL SUGGESTING WAYS TO TAKE ADVANTAGE
OF THE COURT OF MILITARY APPEALS' DECISION IN
UNITED STATES V. GOODE 1 M.J.3 (C.M.A. 1975)

SOURCE: Copy furnished the author by the Chief Defense
Counsel, 2d Marine Division, Camp LeJeune, N.C.,
during September 1976 and by the Navy JAG as a
handout during the 1976 annual JAG conference
conducted during October 1976.

DOING GOODE WORK

1. To the chagrin of many defense counsel, more than a few of whom would not know a staff judge advocate's review if they saw one, the law now affirmatively charges every defense counsel with the responsibility of reading and responding to any SJA Review produced in one of his cases. Beginning 15 May 1975, the staff judge advocate has been obliged to serve a copy of his post-trial review on the defense counsel; the latter, in turn, must "correct or challenge any matter he deems erroneous, inadequate or misleading, or on which he otherwise wishes to comment." Defense counsel's response to the review is to be completed (and, apparently, returned to the SJA)

within five days after service; this five-day period is not deductible from the government's 90-day allowance under DUNLAP; and, to the extent defense counsel fails to challenge otherwise objectionable features of the review, this "will normally be deemed a waiver of any error" therein. *United States v. Goode*, 23 USCMA 367, 50 CMR 1 (1975).

2. From the trial defense counsel's perspective, there are both plusses and minuses in this new rule. And, since the Court's decision left many questions unanswered and created almost as many problems as it solved, it will probably take further case law to determine just how good the GOODE rule is. Inasmuch as the decision is surely designed to benefit the accused, rather than to save the staff judge advocate harmless from his own mistakes, it seems reasonable to suppose that follow-up clarification cases will strengthen the rule. GOODE may well get better. In the meanwhile, though, the rule is upon us, and some time must be taken in learning how to use the mandated procedure to best advantage. What follows are a few suggestions to aid in this process.

3. Procedurally, it would seem important for defense counsel, at the outset, to try to hold the government to certain basic requirements. Counsel should not accept a Review based on an unauthenticated record; neither should he permit service of the Review to be other than personal; further, he should consider nothing but the final, formal, signed copy of the Review; finally, he should insist on receiving a copy of the reply, if any, which the SJA makes to counsel's GOODE response, and should ask to include with the record any rebuttal he may have to "corrections" the SJA may have made. Even if this rebuttal cannot be forwarded prior to the reviewing authority's action, it can at all events be submitted as an "appellate brief." Paragraph 48K(2), *Manual for Courts-Martial*, 1969 (Rev.).

4. Although writing an error-free SJA Review is often a difficult and time-consuming task, reading the Review for the purpose of spotting errors is really a fairly simple exercise. Attached is a check-list of things to look for as you are reading. This list is of course not intended to be all-inclusive, but it may be a helpful beginning place for those not aware

of the ingredients of a proper Review. It may actually prove easier for trial defense counsel to assess the accuracy of the Review than has been true for appellate defense counsel since the former is already familiar with the case and has a rough idea of what a fair Review thereof should contain. One way to prepare for responding to the Review might be to make notes on the key matters adduced at trial as you are examining the record prior to authentication. Then check these notes against the Review to make sure all these matters have been fairly presented.

5. Quite possibly the trickiest part of the new GOODE responsibility will not be spotting errors, but deciding what to do with them after they are spotted. If your challenge against the Review (1) concerns an argument that you feel confident will not be acceded to by the staff judge advocate and will not cause him to change his Review; or (2) concerns obvious error in the Review, likely to be corrected by the SJA, but which surely will make no difference in the reviewing authority's action in any event, then the challenge should be presented in as terse a manner as possible. Your objection should say only enough to preserve the error, and then say no more. If, however, you are dealing with a matter of considerable substance, which, in your judgment, may cause the SJA to alter his position on an important matter and/or result in a different outcome in the reviewing authority's action, the challenge should be more fully developed. Into this latter category might fall a rebuttal to the Review's rationalization of the evidence in a contested case or its sentencing recommendation. GOODE, remember, allows counsel to make comment on anything in the Review he chooses; he is not limited to errors. In a close case, the GOODE response may give counsel an important opportunity he did not have at trial—the last word on a critical findings or sentencing question.

6. Whether the GOODE response is better styled as a summary objection on the one hand, or a reasoned argument on the other, may well turn on to whom you consider yourself addressing your response. The former approach is probably addressed to appellate courts and is intended to preserve an issue; the latter is more likely slanted to the reviewing authority with whom you think a fair chance for relief is present. However, whichever situation is at hand, it is surely a mistake to ever attempt to rewrite a Review and thus help the SJA do his work. In the first place, you haven't time for that; and in the second, your task is no more than to point out areas in which the Review should be improved, not tell the SJA how to improve them.

7. At all events, when in doubt as to whether to assert an error, assert it. Even if the problem cannot be pinpointed exactly, summarily raising it can hardly lose, and could produce an unexpected gain. Particularly will this be so if the law becomes, as seems likely, that an error raised by defense counsel—but left uncured by the SJA—will automatically require relief on appeal, up to and including dismissal. Since GOODE seems intended to require a full and fair SJA Review the first

time it is written, the Court of Military Appeals will surely look askance at error in a Review which an SJA had the chance to set right. Hence, the perceived risk of outright reversal on appeal may give a defense counsel leverage with an SJA who knows he fails at his peril to cure doubtful error. The psychology of the situation may cause an SJA to accede to defense challenges and render a more favorable Review than would otherwise have been possible. Consistent with this analysis, as well as with the proposition that your responsibility is not to assist the SJA in doing his job, it should be rare when defense counsel would cite authority for his assigned errors. Let the SJA find it; or let him gamble as to whether it even exists.

8. Where a DUNLAP violation is impending, special care with GOODE tactics are probably in order. If defense counsel claims the five-day response period—as is his client's right; and since the five days are not treated as an extension of the 90-day period; it seems proper to assert that DUNLAP has, in effect, already been transgressed if counsel is not served by day 85. Indeed, if service has not occurred by that date, it is certain that DUNLAP cannot be complied with, and counsel should consider an immediate petition for extraordinary relief. One such petition is now pending at COMA, and a show cause order has issued. Further, counsel should probably treat DUNLAP as implicated as early as day 80 and prepare accordingly. For, presuming counsel will, in such a situation, err in his GOODE response on the side of raising problems in the Review, and presuming also that some period of time will elapse during the drafting of the SJA's curative reply and the reviewing authority's consideration of the record and all these attached papers, an imaginative counsel may parlay a GOODE response into a DUNLAP dismissal.

A LIST OF POSSIBLE OBJECTIONS

Defense Counsel objects to the following aspects of the Review in the case of United States v. _____:

1. The reviewing authority is disqualified because:
 - a. of his grant of immunity or that of his immediate superior, to _____;
 - b. of his own, or his immediate superior's, promise of clemency or other favorable treatment to _____;
 - c. he is an accuser;
 - d. he testified as a witness;
 - e. he or his predecessor was reviewing authority on a prior review of this case, which has been set aside;
 - f. an action previously taken by the reviewing authority was challenged at trial.
2. The reviewer/staff judge advocate is disqualified because:
 - a. he acted in a capacity covered by UCMJ, Article 6(c);
 - b. he was a witness at the trial;
 - c. he was an accuser;
 - d. he works with or for someone so disqualified;
 - e. he participated in a grant of immunity, promise of clemency, decision to forebear prosecution, etc;
 - f. he prepared a prior review in this case, which has been set aside;
 - g. an action previously taken by the staff judge advocate was challenged at trial.
3. In its (initial synopsis)(rationalization section)(closing boilerplate), the Review (misstates)(runs a risk of misleading the reviewing authority concerning):
 - a. the charges against the accused;
 - b. the precise nature of specification ____ of charge ____;
 - c. the pleas of the accused;
 - d. the findings against the accused.
4. The Review has (omitted)(inadequately summarized):
 - a. the testimony of prosecution witness _____;
 - b. the testimony of defense witness _____;
 - c. the documentary or real evidence concerning _____;
 - d. the stipulation of fact as to _____;
 - e. the judicial notice taken of _____.
5. In its treatment of the credibility of government witnesses, the Review has (omitted)(inadequately summarized):
 - a. the impeaching evidence obtained from _____;
 - b. the previous conviction/Article 15 imposed on _____;
 - c. the inconsistent statements made by _____;
 - d. reference to (a grant of immunity)(favorable treatment) (a promise of clemency) given to _____.

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6. In its treatment of defenses raised by the evidence, the Review has:

- a. incorrectly summarized the applicable law;
- b. shifted the burden of proof to the accused;
- c. (omitted)(inadequately summarized) the testimony of _____;
- d. fairly summarized the testimony, but has then failed to rationalize its rejection of any defense.

7. In its treatment of the accused's testimony on the merits, the review has:

- a. (omitted)(inadequately summarized) it;
- b. failed to rationalize its rejection of that testimony.

8. In resolving the defense motion/objection to _____, the review has:

- a. (omitted)(inadequately summarized) the evidence for the defense;
- b. misrepresented the government's evidence;
- c. provided (erroneous)(misleading) statements of law regarding the motion/objection (for example, the Review has failed to alert the reviewing authority that he must be personally convinced beyond a reasonable doubt concerning the voluntariness of a challenged confession);
- d. failed to rationalize its rejection of the motion/objection.

9. The treatment of the sanity issue is inadequate because:

- a. the summary of the testimony of defense expert _____ omits important matters;
- b. the Review merely recites the conclusions of the expert and does not include his reasoning behind that conclusion;
- c. the Review fails to rationalize its rejection of the defense expert testimony on this issue.

10. Regarding the (hearsay evidence)(evidence of uncharged misconduct) in the testimony of _____, the Review:

- a. included inadmissible evidence thereof;
- b. failed to advise the reviewing authority (of the limited purpose for which it was received)(that it could be considered for no purpose whatever).

11. The Review risks misleading the reviewing authority by (stating the elements)(summarizing the evidence) of an offense of which the accused was found not guilty.

12. The Review is prejudicially inadequate in that it (omits)(is inaccurate as to):

- a. the elements of the offense of _____;
- b. the elements of the lesser included offense of _____ under charge _____, which was reasonably raised by the evidence, and which might have been approved by the reviewing authority in his independent consideration of the matters of record.

13. Regarding the pertinent matters as to sentencing, the Review (omits)(misstates):

- a. the testimony of _____;
- b. the contents of (Prosecution)(Defense) Exhibit _____;
- c. reference to the commander's recommendation that the accused be tried by special court-martial (rather than a GCM) or be given an administrative discharge;
- d. recommendations by court members/the military judge for clemency;
- e. one of the matters listed in MCM 1969 (Rev.), paragraph 86b;
- f. reference to Vietnam service/awards and decorations;
- g. the extent of pretrial confinement;
- h. the clemency recommendations at or after trial of _____;
- i. the accused's (sworn)(unsworn) statement;
- j. the sentence awarded by the court;
- k. the maximum sentence allowable under the pretrial agreement;
- l. the sentence previously-approved by the convening authority;
- m. the content of the accused's petition for clemency;
- n. advice concerning the multiplicity of Charge _____ and charge _____.

14. By providing conclusions rather than reasoning, the Review fails to rationalize its decision regarding:

- a. sufficiency of the evidence as to _____;
- b. rejection of the favorable clemency recommendations.

15. Finally, the Review is defective in that it:

- a. is dated before authentication of the record;
- b. criticizes actions favorable to the accused which have been taken by any officials;
- c. fails to state the staff judge advocate's opinion that he is personally convinced beyond a reasonable doubt of the accused's guilt as to each of the convictions;
- d. fails to advise the reviewing authority that he must be personally convinced beyond a reasonable doubt of the accused's guilt as to each finding to be approved.

APPENDIX VI

LETTER CONTAINING RESULTS OF LEGAL DEBRIEFING
OF BATTALION COMMANDING OFFICERS WITHIN
2D MARINE DIVISION ON THEIR RETURN FROM DEPLOYMENT

OFFICE OF THE STAFF JUDGE ADVOCATE
2d Marine Division (Rein), FMF
Camp Lejeune, North Carolina 28542

MAR 30 1978

From: Chief Review Officer
To: Colonel George L. Bailey USMC

Subj: Synopsis of debriefs from deployed units

1. Each deploying unit within the 2d Marine Division is legally briefed prior to the deployment and subsequently debriefed upon their return. I have been personally involved in all of these briefs and debriefs since 1976 and was, on 1 July 1976 assigned the primary responsibility of conducting these briefs and debriefs. Some of the more serious problems encountered by the different units are discussed here.
2. All units were generally dissatisfied at the amount of time it took for paperwork to be processed. This included all phases of legal matters, NJP appeals, review of courts-martial, requests for Good of the Service discharges, Article 72 hearings, etc. Without a quick response, by the responsible party, the quality of justice was greatly affected. I might mention that because of an operational commitment certain pieces of mail took as long as four months in transit in one situation.
3. The request for the Individual Military Counsel (IMC) causes many problems. One situation comes to mind. An officer was requested just after being detached from the 2d Marine Division. His new duty station was in Japan. The officer reported to Japan and was then found to be available. He then had to fly to Italy for the trial and then return to Japan. The amount of funds used to fly this officer all over the world could have been lessened by a prompt request for the IMC. In that way, the 2d Marine Division could have made the officer available and the cost of transportation would have been decreased.
4. A related situation involves a counsel who was the detailed counsel on a case when the unit was afloat. The court could not be completed while the unit was deployed, the judge advocate had to be brought from Europe to the United States for trial.
5. The above problem may be unpreventable, although in the above cases it seems as if it could have been prevented if steps had been taken to try the case more quickly during the deployment. However, in one case the trial was about to proceed on the last day the unit was in port. On that day, in trial, the defense counsel raised a Catlow/Russo motion and supported the motion with a full brief. The indication here, being that the motion could have been discussed days earlier so that the parties could prepare the case for litigation. In this situation the case was litigated upon

the units return to Camp Lejeune. The trial was brought to a full standstill by the motion due to the time at which it was made. I might add that in this case the accused requested counsel from Camp Lejeune and relieved his detailed defense counsel. This obviated the need to return that defense counsel to the United States for the subsequent trial.

6. Again, another related problem with attempting to try cases while afloat. One unit planned to try several courts while in port for a period of about a week. When negotiations began the Battalion Commander decided not to agree to the offered pretrial agreements. The defense counsel then indicated to the Battalion Commander that without pretrial agreements, the cases could not be litigated within the allocated time frame. The defense counsel then started to request witnesses that he indicated were needed for the case, and indicated that he had a prospective Catlow/Russo motion. This was done just prior to trial. The Battalion Commander indicated that he felt he was being pressured to capitulate to the pretrial demands of the defense counsel. The delays finally went to the point where the cases could not be tried while they were in port, and were finally litigated when the unit returned to Camp Lejeune. The Battalion Commander was dissatisfied with the "legal support" he had received. This situation occurred in all those cases which were processed for trial. While in port, the Battalion Commander was able to finalize none of the cases he had expected to dispose of before returning to Camp Lejeune.

7. During a recent deployment, the Battalion Commander did not utilize the court system while deployed. He found it to be "too expensive". This decision was based upon the fact that he found that the arrangements required to conduct a court-martial while afloat were prohibitive in relation to the time and effort spent. Such time could be better spent in planning and training. The summary court-martial was not an acceptable substitute for the special court-martial because the punishment provided under NJP is almost as great or not greater in some respects than the summary court-martial. The Battalion commander also felt NJP was the only viable alternative in relation to time and expense. All infractions were sent to NJP including one larceny. The Battalion Commander felt the quick punishment was most effective in maintaining discipline within his unit, and he thereby sacrificed his alternative of referring an offense to a court-martial. The effect of this situation is that the Battalion Commander did not have all the alternatives available to him in a situation when he probably needed them the most. The basis for this was, that the alternatives presented to the Battalion Commander were not viable because of the administrative problems that were created. He used NJP which gave him the quickest and most favorable results.

8. Another Battalion Commander discussed the difficulty in running a court-martial while in port. The witnesses are often on different ships and the ships may be in ports as much as 600 miles away from the port where the accused and the trial are located. The logistics problems in getting all the witnesses together is significant to say the least. Another aspect, that I might add

here, is if the accused had wanted his parents or some other state-side witness to testify in extenuation and mitigation, they would probably be held to be material witnesses. As a result, there would be seemingly no way that a court could be concluded while in port with such a demand. The expense involved here could reach a point where the case could not be litigated or maybe the forum would have to be changed. The Battalion Commander is under operational commitments and it is necessary that courts-martial be run quickly and efficiently. A protracted trial cannot be handled without at least some affect upon operational commitments.

9. While afloat, if an individual is to^{be} confined, he must be sent off the ship to a proper confinement facility. This is often an added expense of sending an individual to a facility such as Rota, Spain. It must be remembered here that the accused even after reaching the confinement facility may not be confined by the magistrate, thus, requiring the return of the accused to the ship.

10. Several Battalion Commanders indicated that some offenses were sent to summary courts-martial because the accused received what they considered to be a more appropriate sentence at that forum. This was as opposed to sending the case to a special court-martial. Some counsel even mentioned this fact then discussing pretrial agreements with the Battalion Commander.

Respectfully submitted,

Dennis E. Clancey

D.E. Clancey
Capt. USMC

APPENDIX VII

LETTER FROM 2ND LT. BILL DENLEY, USMCR,
SETTING FORTH AN EXPERIENCE ILLUSTRATIVE OF A
DEFENSE COUNSEL'S PROPENSITY TO PURSUE
ALL "AVENUES" OF THE LAW

Lt. William P. Denley USMC
26 Sunnyside Avenue
Saugus, Massachusetts 01906
4 June 1978

Col. George L. Bailey USMC
Center 4 Advanced Research
Navy War Counsel
Newport, Rhode Island 02840

Dear Sir,

I apologize for not writing sooner. This past month has been a busy one, we finished finals just this past Friday. During the summer of 1977 I served as assistant defense counsel at one of the major Marine Corps commands. I became involved with the military law regarding the compulsory production of defense witnesses. I was amazed to find just how far the court of military appeals had actually gone in this area.

One of the attorneys for whom I worked explained that he had doubled his success rate by holding out the threat of costly witness requests. For attorney X most cases began with an inquiry of the accused as to possible witnesses for E. and M. He stressed the importance of finding witnesses that would be willing to testify as to the accused's good character. Client would be instructed to think of persons stationed in such places as Okinawa and the Mediterranean. Attorney X would then always request members for sentencing. There is dicta in the cases that

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an accused should not be required to stipulate as to character when it is important for the members to view the demeanor of the witness on the stand. In all the cases that I actively participated in, as a direct result of the witness requests pre-trial negotiations took place with an eventual lowering of the charges. In two of the cases the charges were handled at office hours and in the third case the defendant pleaded guilty in exchange for a guarantee of no confinement. In all three cases the evidence against the accused was overwhelming and the witness requests were for argument on sentencing only.

This defense tactic works very well when the charges are of a minor nature and the accused has been in the service long enough to have made friends who are now stationed a good distance away. It is also important as defense counsel to contact the witness by phone before trial. The case law seems to allow the military judge to deny any request absent a showing of materiality. Several unreported cases that came down prior to U.S. v. Willis, 3 Military Justice Reporter 94 (May 16, 1977) upheld the judge's denial of a witness request when the defense counsel had not been in contact with the witness so as to be sure of his expected testimony. However, once the defense counsel has made a showing of materiality, the government will be hard pressed

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not to produce the witnesses. The government is forced to decide if it is worthwhile to spend the time and money to bring back two or three witnesses just to convict the accused at a special court for a minor offense. My experience is that the government is usually willing to strike a deal in exchange for a withdrawal of the witness requests.

In one case last August, attorney X was requested as individual military counsel for an accused marine at Albany, Georgia. The accused had been caught "red handed" smoking marijuana in the General's head. In this particular case the accused knew all kinds of people all over the world who would come back to testify with regards to the accused's character. Attorney X took some serious heat, but two days later the charges were dropped and the matter was handled at office hours.

I have discussed this particular defense tactic with others on several occasions. There is certainly disagreement whether or not an attorney can ethically make these witness requests when the sole purpose behind the request is to break the bank so to speak. Assuming that the Court of Military Appeals has not come down with anything since Willis supra, I think the law is clear. For an attorney to fail to make a motion that he has reason to believe will better the interest of his client, when that

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motion has a basis in law, amounts to gross incompetence. Any attorney who fails to utilize such a powerful defense tool because of "moral" problems in so doing, is in my view directly and deliberately violating cannon 7 of the code of professional responsibility.

In addition to the Willis case, I found U.S. v. Jouan 3 Military Justice Reporter 136, May 31, 1977 to be of value regarding witness request for the case in chief.

I hope this information can be of some value to you and again my apologies for being late. Best of luck in Okinawa.

Sincerely,

William P. Denley

William P. Denley
2d Lt. USMC

WPD/sed

APPENDIX VIII

LETTER CONTAINING STATISTICS ON "CATLOW-RUSSO" MOTIONS
WITHIN THE NAVY-MARINE CORPS TRIAL JUDICIARY, SOUTHWEST
JUDICIAL CIRCUIT, SAN DIEGO, CA.

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHWEST JUDICIAL CIRCUIT
NAVAL STATION P.O. BOX 138
SAN DIEGO, CA 92136

2 May 1978

Colonel George BAILEY, USMC
Naval War College
Newport, RI 02840

Dear Colonel BAILEY:

Judge MORGAN called me last week and said you'd like some data on the incidence of CATLOW-RUSSO motions.

Attached is a statistical summary covering the last 12 months. This is raw data and needs some interpretation.

First of all, I would ignore the GCM statistics; there aren't enough of them to provide any basis for a trend.

Second, the SPCM statistics for May - September 1977 are of doubtful utility. Prior to 1 October the only figures that were kept accurately were CATLOW-RUSSO granted. Those denied were extracted from case files and the figures may not be complete.

Next are the figures for February. Because of a multitude of interrelated factors (funding, Bureau policy, command policy, among others), we got rid of a lot of CATLOW-RUSSO cases. This figure is misleading and probably shouldn't be cranked into the overall statistics.

This leaves October 1977 - January 1978 and March and April 1978. These figures are accurate and indicate that CATLOW-RUSSO motions are now made in about 20% of the cases where they were being made in about 10% of the cases. This tends to support my judges' feelings that these motions are now being made in about twice as many cases - on a per case basis - as were being made six months or a year ago.

There are a lot of reasons for this but the main one seems to be that the word is spreading that this is a good way to delay a case or even get it dropped to the administrative level. A lot of CATLOW-RUSSO motions were granted in the past because the Government would not call the defense requested witnesses or the recruiter. Now, the witnesses are starting to be brought

in with the result that there are fewer successful motions. Perhaps this will cause the trend to decrease some.

Sincerely,

Bob

ROBERT M. REDDING
CAPT, JAGC, USN
Circuit Military Judge

Copy to:
CH NAVMATRIJUDIC WASH DC

CATLOW/RUSSO

<u>MO/YR</u>	<u>#SPCM'S TRIED</u>	<u># CAT/RUS MOTIONS</u>	<u>#CAT/RUS GRANTED</u>	<u># GCM'S TRIED</u>	<u>#CAT/RUS MOTIONS</u>	<u>#CAT/RUS GRANTED</u>
MAY 77	49	3	1	1	1	0
JUN 77	51	3	1	2	2	1
JUL 77	64	4	2	0	0	0
AUG 77	43	3	0	0	0	0
SEP 77	71	3	1	2	0	0
OCT 77	45	2	0	1	0	0
NOV 77	50	4	3	0	0	0
DEC 77	56	3	2	1	0	0
JAN 78	75	7	2	1	0	0
FEB 78	79	30	25	2	0	0
MAR 78	80	14	7	1	1	0
APR 78	73	12	3	4	1	0

APPENDIX IX

MEMORANDUM FROM ARMY JAG, DATED 7 SEPTEMBER 1976
SETTING FORTH INFORMATION REGARDING INDEPENDENT
DEFENSE SERVICE FOR THE U.S. ARMY

SOURCE: Copy of letter provided the author on 24 September
1976 by Major Roy Whitehead, USMC, Senior Marine
Instructor, Army JAG School, Charlottesville, VA.

DAJA-ZA

7 September 1976

SUBJECT: Field Defense Services

TO: ALL STAFF JUDGE ADVOCATES

1. One of our most important responsibilities is to insure that each soldier accused of an offense under the Code is provided the best possible defense services. The heart of defense services lies in the quality and effectiveness of trial representation. Although we can take pride in our defense services, there remains room for improvement. This is particularly true with regard to providing field defense counsel with assistance and a program of continued professional development. Accordingly, the purpose of this letter is to announce the creation of the Field Defense Services Office, designed to fulfill this need, and to explain how it will function in relationship to our total defense system.

2. My chief advisor in matters regarding the defense function is the Assistant Judge Advocate General for Civil Law (AJAG/CL). He executes this responsibility through the defense organization, which includes the new Field Defense Service Office -- Defense Appellate Division (FDS), Major Command (MACOM) senior defense counsel and installation senior defense counsel. For this reason, although subordinate counsel are authorized direct communication with AJAG/CL, they are encouraged first to seek solutions to all matters through the defense organization. Further amplification of defense counsel relationships and training may be found in BG Coggins' letter of 25 April 1975 to all defense counsel, and my letter of 23 July 1975 to staff judge advocates, both to be reprinted shortly in the Army Lawyer.

3. Proper utilization of this organization requires complete understanding of its structure and capabilities. The cornerstone of this chain is the general court-martial jurisdiction senior defense counsel. He is the major point of coordination between trial defense counsel and the staff judge advocate. His major responsibilities are:

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SUBJECT: Field Defense Services

a. Receiving and resolving what he deems to be valid complaints from subordinate defense counsel or referring those complaints to appropriate military authority. Resolving any differences between office defense counsel and the staff judge advocate either by direct communication with him or up the defense chain.

b. Receiving and taking appropriate action on complaints from defense related personnel against defense counsel, e.g., clients, parents, relatives, and civilian attorneys.

c. Serving as a consultant, on request, to all subordinate counsel on trial tactics and potential problems, and monitoring individual counsel skill levels to insure that they possess that skill requisite for case assignments.

d. Monitoring and resolving deficiencies in the separateness and adequacy of subordinate counsel offices, and administrative and logistical support.

e. Administrative supervision of all installation defense counsel and their activities, including case assignments; determination of the availability of individual requested counsel; rating subordinate counsel, and the presentation of defense policy problems.

This list is not intended as all inclusive, and I emphasize that effective and imaginative implementation of this role will result in better service to the client and the Corps.

4. The MACOM senior defense counsel is the point of contact for matters relating primarily to command aspects, such as complaints against SJA's and the adequacy of support, when such matters cannot be solved locally and must be referred to a higher command level.

5. In order to make the defense chain more responsive to the needs of defense counsel, I have directed the creation of a separate field defense services office, (FDS), within the Defense Appellate Division, to operate under the auspices of AJAG/CL. That office will be operational on 1 October 1976 and will provide the following services:

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SUBJECT: Field Defense Services

a. Ethics guidance and trial tactics advice. It will provide telephonic or written guidance and/or research assistance to specific field inquiries in time for use at trial.

b. Preparation of The Advocate and other periodic communications, to insure distribution of new defense developments.

c. In coordination with TJAGSA, present instruction on defense matters at the basic course and at a new semiannual continuing legal education course for defense counsel. Additionally, they will coordinate periodic regional defense counsel seminars, which will stress the practical application of changes in HQDA policy, military and other criminal judicial developments, the solutions to recurring field problems, trial tactics, and the defense role in pre-trial and post-trial levels.

d. Periodic visits with field defense counsel to insure two-way communication and personal professional contact within the defense organization, and to evaluate our system of defense services.

e. Long range planning, which will make maximum utilization of field input, to insure continual refinement of the defense chain and its delivery of defense services.

6. I stress that this new office is to aid the field and to react to problems as they arise. It will not unilaterally initiate contact with the field to create appellate issues, nor otherwise involve itself in your jurisdictions. An Army Lawyer article will present the defense structure in more detail in the near future. I commend it to your reading and study. The first two Defense Advocacy Courses are scheduled for 26-29 October 1976 and 18-21 April 1977. You should insure that your defense counsel and prospective defense counsel take advantage of these courses.

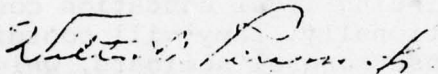
7. In overseas commands, it would be difficult for FDS to perform those functions requiring personal contact. Each

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SUBJECT: Field Defense Services

major command overseas should task its senior defense counsel to assume these functions in coordination with FDS.

8. We have outstanding defense services today. I am confident that with your support and enthusiastic implementation of the complete defense organization, our service will be significantly better in the future. As always, your comments and suggestions are welcome.



WILTON B. PERSONS, JR.
Major General, USA
The Judge Advocate General

APPENDIX X

COPY OF SPEECH OF MAJOR GENERAL WILTON B. PARSONS, JR., JUDGE
ADVOCATE GENERAL OF THE ARMY, TO THE FEDERAL BAR ASSOCIATION
CONVENTION, SAN JUAN, PUERTO RICO, ON 29 September 1977

SOURCE: Copy of speech provided the author on 12 April 1977
by Rear Admiral W. O. Miller, JAGC, USN, Navy JAG,
Washington, D.C.

MAJOR GENERAL WILTON B. PERSONS, JR.
THE JUDGE ADVOCATE GENERAL OF THE ARMY
FBA CONVENTION, SAN JUAN, PUERTO RICO

29 SEPTEMBER 1977

THE CRIMINAL JUSTICE SYSTEM IN THE CIVILIAN SECTOR MAY BE VIEWED AS A TRIPOD, CONSISTING OF THE PROSECUTOR, THE DEFENSE ATTORNEY, AND THE JUDGE. THE POLICE ARE THE BEGINNINGS OF THE SYSTEM AND CORRECTIONS PERSONNEL ITS END, BUT NO INSTITUTIONS OUTSIDE THE TRIPOD ARE INVOLVED IN THE TRIAL OF CASES.

THE MILITARY CRIMINAL JUSTICE SYSTEM, HOWEVER, DIFFERS. IN ADDITION TO PROVIDING FOR THE SAME TRIPOD AS IN CIVILIAN CRIMINAL JUSTICE--STRONG AND INDEPENDENT JUDGES, PROSECUTORS, AND DEFENSE COUNSEL--THE UNIFORM CODE OF MILITARY JUSTICE--OR UCMJ AS IT IS CALLED--GIVES CERTAIN JUDICIAL FUNCTIONS TO COMMANDERS, THE JUDGE ADVOCATES GENERAL, AND THE PRESIDENT OF THE UNITED STATES.

OF COURSE, THESE ELEMENTS OF MILITARY JUSTICE ARE NOT MEMBERS OF A TEAM, BUT FUNCTION SEPARATELY WITHIN THE ADVERSARY SYSTEM. EACH ELEMENT MUST PERFORM ITS STATUTORY ROLE, WHILE RESPECTING THE BOUNDARIES PRESCRIBED BY CONGRESS. THE UNIFORM CODE GIVES THE JUDGE ADVOCATES GENERAL AND THE COURT OF MILITARY APPEALS COMPLEMENTARY ROLES, BUT IT MUST BE BORNE IN MIND THAT THE ROLES ARE MUTUALLY EXCLUSIVE. NO ONE ELEMENT OF THE MILITARY JUSTICE SYSTEM CAN PREDOMINATE TO THE EXCLUSION OF OTHERS.

ANY ANALYSIS OF AUTHORITY IN THE FEDERAL SYSTEM MUST BEGIN WITH THE CONSTITUTION. THE SUPREMACY CLAUSE STATES THAT "THE CONSTITUTION, AND THE LAWS OF THE UNITED STATES WHICH SHALL BE MADE IN PURSUANCE THEREOF . . . SHALL BE THE SUPREME LAW OF THE LAND" THE UCMJ IS INDEED A "SUPREME LAW OF THE LAND" MADE IN PURSUANCE OF THE CONSTITUTION. IN MY VIEW, THEREFORE, ARTICLES 6 AND 36 OF THE CODE, AND THE POWERS THEY GIVE TO THE PRESIDENT AND THE JUDGE ADVOCATES GENERAL, CAN ONLY BE CALLED INTO QUESTION BY CHALLENGING THEIR CONSTITUTIONALITY. UNTIL THEY ARE HELD TO BE UNCONSTITUTIONAL, THEY REMAIN SUPREME LAW.

OBVIOUSLY, IN ANY LEGAL SYSTEM, THERE MUST BE SOME JUDICIAL LAW MAKING. BUT, IN A SYSTEMATIC SENSE, JUDICIAL LEGISLATING IS NOT PART OF THE DEMOCRATIC PROCESS. FEDERAL JUDGES ARE NOT SELECTED--THEY HAVE NO CONSTITUENCY. THE COURT IS RESTRICTED TO THE BOUNDS OF THE ADVERSARY SYSTEM FOR ITS DECISIONAL BASE. IT DOES NOT HAVE CONGRESS' FACT-FINDING POWERS OR THE ABILITY TO ENTERTAIN A VARIETY OF OPINIONS THROUGH HEARINGS. SO WHEN A COURT EMBARKS ON AN ACTIVIST COURSE, AS THE COURT OF MILITARY APPEALS HAS, ITS JUDICIAL LEGISLATING IS A MATTER OF LEGITIMATE CONCERN TO OTHER PARTICIPANTS IN THE PROCESS EXERCISING STATUTORY POWERS.

ARTICLE 36 (A) OF THE UCMJ SAYS THE PRESIDENT HAS AUTHORITY TO PRESCRIBE RULES FOR PROCEDURE BEFORE COURTS-MARTIAL. HE EXERCISES THIS AUTHORITY THROUGH AN EXECUTIVE ORDER PRESCRIBING THE MANUAL FOR COURTS-MARTIAL. MANY CASES BEFORE THE COURT OF

MILITARY APPEALS OVER THE YEARS HAVE RAISED THE ISSUE OF WHETHER A PRONOUNCEMENT IN THE MANUAL IS PROCEDURAL OR SUBSTANTIVE. IF A MANUAL PROVISION IS CLEARLY SUBSTANTIVE, THERE SEEMS NO QUESTION THAT THE LAW AS IT APPLIES TO COURTS-MARTIAL MUST FINALLY EVOLVE FROM THE COURTS OF THE NATION. THE PRESIDENT'S ROLE UNDER ARTICLE 36 (A) AND THE PROCEDURAL-SUBSTANTIVE ARGUMENT CONTINUES TO BE LITIGATED. A RECENT EXAMPLE IS THE COURT OF MILITARY APPEALS' OPINION IN FREDERICK, CONCERNING THE MENTAL RESPONSIBILITY TEST IN THE MANUAL FOR COURTS-MARTIAL. THE MANUAL TEST COMBINES McNAGHTEN'S RULE WITH THE "IRRESISTIBLE IMPULSE" TEST. JUDGE COOKE'S OPINION IN FREDERICK HELD THE TEST FOR MENTAL RESPONSIBILITY WAS A MATTER OF SUBSTANTIVE LAW, NOT WITHIN THE PRESIDENT'S ARTICLE 36 RULE-MAKING POWERS. THE COURT THEN REJECTED THE MANUAL TEST AND ADOPTED THE DEFINITION OF INSANITY RECOMMENDED BY THE AMERICAN LAW INSTITUTE. IN MY OPINION, THIS CASE IS ILLUSTRATIVE OF A PROPER EXERCISE OF THE COURT'S POWERS. PREDICTABLY, THE PROCEDURAL-SUBSTANTIVE DEBATE WILL CONTINUE ON ISSUES NOT CLEARLY FALLING IN EITHER CATEGORY.

BUT, EVEN WHERE AN ISSUE IS WELL BEYOND THE COURT'S REVIEW POWERS UNDER ARTICLE 67, OR EVEN IF THE FIELD HAS BEEN PRE-EMPTED BY ANOTHER ARTICLE, SUCH AS ARTICLE 6, THE COURT STILL HAS NOT HESITATED TO ACT. EXAMPLES OF THE COURT STEPPING BEYOND ITS STATUTORY ROLE UNDER ARTICLE 67 ARE NUMEROUS. THE WEST POINT HONOR CODE CASES INVOLVED PURELY ADMINISTRATIVE

HEARINGS. YET THE COURT HEARD ARGUMENT ON AN EXTRAORDINARY WRIT WHICH SOUGHT TO STAY THE SEPARATION PROCEEDINGS. ALTHOUGH IT DISMISSED THE CASE, THE DISMISSAL WAS WITHOUT PREJUDICE AND LEFT OPEN THE QUESTION OF THE COURT'S JURISDICTION TO HEAR SUCH CASES. NOWHERE IN ARTICLE 67 DOES CONGRESS SAY THE COURT HAS JURISDICTION OVER ADMINISTRATIVE HEARINGS.

ALSO, THE COURT HAS USURPED THE ARTICLE 69 REVIEW AUTHORITY OF THE JUDGE ADVOCATES GENERAL IN THE McPHAIL CASE. AND, IT HAS CHANGED THE PROCEDURE FOR WITNESS PRODUCTION AT TRIAL IN THE CARPENTER CASE. I WON'T DWELL ON THESE, AS CAPTAIN COOKE HAS ALREADY BROUGHT YOU UP-TO-DATE ON RECENT DECISIONS BY THE COURT.

BUT LET ME BE MORE SPECIFIC IN VOICING MY CONCERNS. IN PART, THEY ARE OVER PROCEDURES PRESCRIBED BY THE PRESIDENT UNDER HIS ARTICLE 36 RULE-MAKING AUTHORITY, WHICH NEVERTHELESS HAVE BEEN OPENED FOR REVIEW BY THE MILITARY'S HIGHEST APPELLATE COURT. THEY ARE OVER EXCURSIONS BY THE COURT INTO THE ARTICLE 6 POWERS OF THE JUDGE ADVOCATES GENERAL. CASES WHICH PARTICULARLY CONCERN ME ARE THOSE LIMITING THE WAIVER DOCTRINE WHEN TRIAL DEFENSE COUNSEL FAILS TO RAISE AN ISSUE. THESE CASES INDICATE THAT THE COURT HOLDS THE ABILITY OF THE TRIAL DEFENSE COUNSEL IN LOW ESTEEM. THROUGH ARTICLE 6 OF THE UCMJ, CONGRESS IMPOSED UPON THE JUDGE ADVOCATES GENERAL THE DUTY TO RECOMMEND ASSIGNMENTS OF MILITARY LAWYERS AND TO SUPERVISE THEIR CONDUCT. THIS IS NOT A DUTY THAT WE TAKE LIGHTLY. THE QUALITY OF

REPRESENTATION AT COURT IS CLOSELY MONITORED BY THE SENIOR LAWYERS OF ALL SERVICES. IN MY OPINION, THE MILITARY SETS THE STANDARD FOR EXCELLENCE IN THE REPRESENTATION OF ACCUSED AT TRIAL. HOWEVER, TO ENSURE THIS IMPORTANT ARTICLE 6 FUNCTION IS CARRIED OUT, WE IN ARMY JAG HAVE UNDERTAKEN SEVERAL PROGRAMS. WE HAVE A PROFESSIONAL ETHICS COMMITTEE WHICH ADVISES ME ON MATTERS OF PROFESSIONAL RESPONSIBILITY. IT REVIEWS SPECIFIC CASES OF ALLEGED MISCONDUCT INVOLVING ETHICAL QUESTIONS, AND PROVIDES ME WITH A RECOMMENDATION AS TO WHAT ACTION, IF ANY, SHOULD BE TAKEN.

LAST YEAR, WITHIN OUR DEFENSE APPELLATE DIVISION, A FIELD DEFENSE SERVICES OFFICE WAS ESTABLISHED. ITS CHIEF PURPOSE IS TO BE A SOURCE OF UP-TO-DATE INFORMATION ON RECENT COURT DECISIONS, AS WELL AS DEPARTMENT OF THE ARMY POLICY. IT ALSO PROVIDES PRACTICAL ASSISTANCE TO DEFENSE COUNSEL IN THE FIELD. SINCE JANUARY 1977, FIELD DEFENSE SERVICES HAVE CONDUCTED 17 SEMINARS FOR MILITARY DEFENSE ATTORNEYS THROUGHOUT THE WORLD. EVERY ARMY DEFENSE COUNSEL HAS HAD THE OPPORTUNITY TO ATTEND ONE OF THESE SEMINARS. ALONG THIS SAME LINE, THE JUDGE ADVOCATE GENERAL'S SCHOOL IN CHARLOTTESVILLE HAS ADDED COURSES IN DEFENSE ADVOCACY AS PART OF ITS OVERALL CONTINUING LEGAL EDUCATION PROGRAM.

THIS SPRING I ADOPTED A POLICY OF SPLIT CERTIFICATION OF COUNSEL. UPON COMPLETION OF THE JUDGE ADVOCATE BASIC COURSE, GRADUATES CONTINUE TO BE CERTIFIED AS TRIAL COUNSEL, BUT NOT AS

DEFENSE COUNSEL. ONLY AFTER A MINIMUM OF FOUR MONTHS' COURT-ROOM EXPERIENCE AND A RECOMMENDATION BY THE SUPERVISING STAFF JUDGE ADVOCATE, IS AN ATTORNEY ELIGIBLE FOR CERTIFICATION AS THE PRIMARY DEFENSE COUNSEL IN GENERAL AND SPECIAL COURTS-MARTIAL.

WE ARE PRESENTLY WORKING ON ESTABLISHMENT OF A SEPARATE DEFENSE CORPS. UNDER THIS CONCEPT, TRIAL DEFENSE COUNSEL WOULD NO LONGER BE ASSIGNED TO THE LOCAL JUDGE ADVOCATE OFFICE, BUT WOULD OPERATE WITHIN A SEPARATE ORGANIZATION SIMILAR TO OUR TRIAL JUDICIARY.

THESE EXAMPLES ILLUSTRATE HOW MY SUPERVISORY DUTIES UNDER ARTICLE 6 ARE BEING ACCOMPLISHED. COUNSEL ARE PRESUMED TO BE ACTING RATIONALLY, INTELLIGENTLY, AND ALWAYS IN THE BEST INTEREST OF THEIR CLIENTS. LIKE CONGRESS, I AM CONFIDENT WE HAVE SUFFICIENT MEANS AVAILABLE TO SUPERVISE THIS IMPORTANT TRUST.

THE LANGUAGE OF ARTICLE 6 SEEMS CLEAR ENOUGH WHEN IT DIRECTS THE JUDGE ADVOCATES GENERAL TO SUPERVISE THE ADMINISTRATION OF MILITARY JUSTICE. BUT ARTICLE 67, WHICH IS THE SOURCE OF THE COURT OF MILITARY APPEALS' AUTHORITY, IS SILENT ABOUT ANY SUPERVISORY POWERS THE COURT MAY EXERCISE OVER COUNSEL. WHEN A STATUTE IS SILENT IN ONE PART BUT DIRECTIVE IN ANOTHER, THEN CERTAINLY THE LAW IS SINGULAR IN ITS DIRECTION. RULE 4 OF THE COURT'S RULES OF PRACTICE AND PROCEDURE, EFFECTIVE 1 JULY 1977, APPEARS TO THRUST IT INTO THE SUPERVISORY AREA RESERVED

FOR THE JUDGE ADVOCATES GENERAL BY ARTICLE 6. THIS RULE EXPANDS THE EXTRAORDINARY WRIT POWERS OF THE COURT TO INCLUDE "EXERCISE OF SUPERVISORY POWERS OVER THE ADMINISTRATION OF THE CODE ". THE COURT CERTAINLY MUST BE ALLOWED TO MAKE RULES GOVERNING PRACTICE BEFORE IT AND, INDEED, ARTICLE 67 GIVES IT THAT AUTHORITY. YET WHEN A RULE, AS IT DOES HERE, CARVES INTO A STATUTORY PROVISION RESERVED FOR ANOTHER ELEMENT OF THE SYSTEM, THEN IT HAS NO VALIDITY.

I CAN APPRECIATE THE SENSE OF JUDICIAL FRUSTRATION THAT STEMS FROM NOT BEING ABLE TO GO BEYOND THE IMMEDIATE CASE PRESENTED FOR APPELLATE REVIEW. NEVERTHELESS, THE ROLES OF THE COURT AND THE ROLES OF THE PRESIDENT AND THE JUDGE ADVOCATES GENERAL ARE CLEARLY DEFINED IN THE UCMJ AND MUST BE RESPECTED.

ALTHOUGH THE COURT'S CURRENT ACTIVIST POSTURE HAS CAUSED CONSTERNATION, IT HAS GENERATED MUCH RE-THINKING OF CONCEPTS LONG UNQUESTIONED AND, TOWARD THAT END, HAS MADE THE FIELD QUITE LIVELY AND DYNAMIC. AFTER ALL, ONE NEED ONLY LOOK AT THE THEME OF TODAY'S DISCUSSIONS FOR AN EXAMPLE OF THE COURT'S IMPACT. CERTAINLY ANY SYSTEM WILL BENEFIT FROM SEEING ITSELF FROM A NEW PERSPECTIVE.

WHAT THEN CAN BE DONE TO CLARIFY FOR THE COURT THE PRESIDENT'S RULE-MAKING AUTHORITY UNDER ARTICLE 36 AND THE JUDGE ADVOCATES GENERAL'S APPOINTMENT AND SUPERVISORY AUTHORITY UNDER ARTICLE 6? ONE APPROACH WOULD BE TO AMEND THESE ARTICLES TO MAKE THEM

CLEARER. BUT THE LANGUAGE IN THEM SEEMS CLEAR ENOUGH ALREADY. IN ARTICLE 36, CONGRESS SAYS THAT THE PRESIDENT SHALL PRESCRIBE THE PROCEDURE "WHICH SHALL, SO FAR AS HE CONSIDERS PRACTICABLE, APPLY THE PRINCIPLES OF LAW AND THE RULES OF EVIDENCE GENERALLY RECOGNIZED IN . . . UNITED STATES DISTRICT COURTS," SO LONG AS THEY ARE NOT INCONSISTENT WITH THE CODE. PERHAPS AN ATTEMPT TO ADD A MORE PRECISE DEFINITION OF PROCEDURE, INCLUDING EXAMPLES, SHOULD BE CONSIDERED BY THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE AS A POSSIBLE LEGISLATIVE PROPOSAL. ARTICLE 6, ON THE OTHER HAND, APPEARS TO BE PRE-EMPTIVE IN THE AUTHORITY GIVEN TO THE JUDGE ADVOCATES GENERAL TO CONTROL APPOINTMENTS OF JUDGE ADVOCATES AND TO SUPERVISE THE ADMINISTRATION OF MILITARY JUSTICE. IN VIEW OF THE COURT'S VENTURING INTO IT, HOWEVER, IT MAY ALSO BE A WORTHWHILE SUBJECT FOR THE JOINT SERVICE COMMITTEE TO STUDY.

MEANWHILE, SENATE BILL 1353 IS PRESENTLY BEFORE COMMITTEE. THIS BILL PROPOSES TO ALLOW THE SUPREME COURT TO REVIEW COURT OF MILITARY APPEALS' DECISIONS BY WRIT OF CERTIORARI. PASSAGE WOULD CARRY WITH IT THE POTENTIAL FOR RESOLVING SOME OF THE ISSUES I HAVE DISCUSSED WITHOUT ADDITIONAL LEGISLATION. THE ROUTE NOW TO THE SUPREME COURT IS OPEN ONLY TO THE ACCUSED BY WAY OF COLLATERAL ATTACK IN FEDERAL DISTRICT COURTS. THE PROPOSED SENATE BILL WOULD ENABLE THE GOVERNMENT, AS WELL AS THE ACCUSED, TO APPEAL AN ADVERSE RULING BY THE COURT OF MILITARY APPEALS TO THE SUPREME COURT. ALTHOUGH THIS BILL WOULD CERTAINLY PROLONG THE APPELLATE PROCESS IN SELECTED

INSTANCES, IT WOULD BE MUCH HEALTHIER THAN OUR PRESENT SYSTEM. I WELCOME THIS PROPOSED LEGISLATION AND STRONGLY URGE THE FBA TO GIVE FULL SUPPORT TO ITS ENACTMENT.

IN CONCLUSION, I WANT TO RETURN TO A THEME I STRESSED EARLIER. PEOPLE MAKE LAWS THROUGH THEIR REPRESENTATIVES AND SUCH A DEMOCRATIC PROCESS SHOULD BE RESPECTED BY OUR COURTS. CONGRESS HAS DELEGATED CERTAIN POWERS IN ARTICLES 6 AND 36 OF THE UCMJ, AND, AFTER ALMOST THREE DECADES OF REVIEW, HAS SHOWN NO INTEREST IN LIMITING OR OTHERWISE CHANGING THESE POWERS. IF SUCH POWERS ARE NOT TO BE RECOGNIZED, IT SHOULD NOT BE ON THE BASIS OF WHETHER THEY ARE GOOD OR BAD--WHICH IS NOTHING MORE THAN OPINION DEPENDING ON WHOSE OX IS BEING GORED--BUT ON WHETHER OR NOT THEY ARE CONSTITUTIONAL.

APPENDIX XI

LIST OF SUGGESTED LEGAL REVISIONS, SUBMITTED BY
CHIEF JUDGE FLETCHER, U.S. COURT OF MILITARY APPEALS,
ON 21 JULY 1975 TO THE JOINT SERVICE COMMITTEE
ON MILITARY JUSTICE

SOURCE: Copy provided the author on 12 April 1978 by Rear
Admiral W. O. Miller, JAGC, USN, Navy JAG, Washington,
D.C.

IDEAS CONCERNING REVISION OF UCMJ,
WARRANTING DISCUSSION AT THE JULY 21, 1975 MEETING

I. THE CONVENING AUTHORITY

- A. The staff judge advocate's role in the convening process should be recognized by statute. While realizing the obvious desirability of the Joint Services Committee's recommendation which precludes the reference of charges to general courts-martial without staff judge advocate approval, an extension of that concept to all courts-martial would enhance the overall integrity of the system.
- B. This Court endorses the recommendation of the Joint Services Committee which restricts the Staff Judge Advocate's post-trial, review to oral or written advice concerning sentence.
- C. The convening authority's post-trial responsibility should be limited to matters of clemency, as recognized by the Joint Services Committee.
- D. Statutory power of the convening authority to overrule trial judges on certain matters of law should be abolished.
- E. The Code should be amended to eliminate the power in the convening authority to appoint judges and counsel. Such a change is supported by considerations of fundamental fairness as well as perception of the system. In addition, such a modification would simply recognize the fact that, as a practical matter, convening authorities today play an insignificant role in the actual selection of judges and counsel.
- F. The perceived fairness of the military justice system also would be enhanced if the staff judge advocate were rated by someone other than the convening authority. This could be implemented without statutory change--as, for example, by regulation providing that Staff Judge Advocates shall be rated by the Judge Advocate General.

II. SUBSTANTIVE OFFENSES

- A. Substitute codified offenses for Articles 133 and 134.
- B. Enact a "civil rights" statute for military justice purposes. Such a provision, which might resemble existing federal criminal law, could deal with unlawful discrimination and deprivation of civil rights. This idea, suggested by the 1971 Task Force on the Administration of Military Justice, would facilitate prosecution of civil rights violations on a worldwide basis.
- C. Create a separate statutory offense for the issuance of an illegal order.
- D. Create a new substantive offense of kidnapping. This change would provide a substantive basis for a kidnapping prosecution where the offense was committed in a foreign country.
- E. Codify a comprehensive assimilative crimes act as a substitute for Article 134(3).

III. TRIAL PROCEDURE

- A. Concomitant with the suggestion of abolition of the convening authority's power to name a trial judge is the concept of a truly independent judiciary at both the trial and appellate levels. This independence can be implemented in several ways. First, consideration should be given to appointment of judges for a term of years with removal by appropriate authority for good cause only. Removal authority might be vested in a judicial council. (See X. C.) In addition, consideration also should be given to the matter of OER ratings of judges while serving in their judicial capacity. Because the rating power carries an inherent capacity for abuse (or perceived abuse), it may be appropriate to abolish the "rating" of judges. In addition, the present prohibition (found in Article 26) regarding the performance of non-judicial duties by judges should be strengthened with the goal of enhancing the independence of the judiciary.

- B. Under present law, it has been argued that a military judge has no continuing status or jurisdiction; and that his powers over a particular case begin only after charges have been referred. Similarly, it has been urged that this gap leaves no one with judicial status empowered to correct certain pretrial abuses. To clarify the matter, it would seem desirable that the trial and appellate judiciary be vested with continuing jurisdiction.
- C. Under present law, the trial counsel (and the convening authority in pretrial disputes) play an integral role in determining the need for defense witnesses. In addition, civilian witness requests necessarily involve the civilian judicial system. These cumbersome circumstances support vesting military trial judges with complete subpoena power.
- D. Under present law, military trial judges have no power over contempts committed outside the presence of the court. The Code should confer upon such judges a contempt power similar to that of federal trial judges. This would enable the trial judiciary to give effect to all rulings.
- E. Under present law, it is unclear whether military trial judges possess extraordinary writ jurisdiction. Recognition of such jurisdiction by a statute would resolve the dispute.
- F. As recognized by the Joint Services Committee, the trial judge should be required to advise the accused of his appellate rights after sentence is pronounced.

IV. PRETRIAL CONFINEMENT

- A. Although the convening authority or other appropriate commander should retain the power to order arrest or confinement, the initial probable cause determination for continuing arrest or confinement should be made by a trial judge or a military magistrate.

- B. Under the present Code, there is no provision for bail as an alternative to pretrial confinement. Consideration should be given to creating a bail system where the only question is whether the accused will be present for his court-martial. Where there is a likelihood that the individual would commit further violent offenses, bail would not be allowed.

V. SENTENCING

- A. Sentencing is, in essence, a judicial function. The authority to sentence should therefore be vested exclusively in the trial judge, regardless of whether the court members determine the issue of guilt. The military judge's sentencing power should also include the authority to suspend any adjudged sentence and the authority to defer sentencing pending preparation of a probation report, as is presently done in the Air Force after trial. Additionally, military judges more appropriate should make the determination of whether to vacate a suspended sentence or probation order.
- B. Consideration should be given to providing mandatory credit for all pretrial confinement.
- C. The Code should provide for separate sentences for each offense. The present system often requires appellate reversal of the entire sentence even though an error committed at trial affects only a single charge. Implementation of the concurrent sentence doctrine would alleviate this problem.
- D. The authority of the Judge Advocates General under Article 69 should be broadened to include the authority to reduce sentences. This would obviate the need for reference of many cases to the service secretaries.

VI. COURT MEMBERS

- A. The principle of random selection of court members should be considered as a means of enhancing

the perception of fairness in the military system of justice. The present superiority of rank criteria could be maintained. Additionally, an enlisted accused should have the option of a court selected from a pool which includes enlisted members as is presently available.

- B. Some consideration should be given to enlarging the size of the court to conform more closely to federal and state practice. Perhaps the number of court members required for a general court-martial should be set at nine, and the number required for a special court-martial at five.
- C. To eliminate the varying percentage necessary for conviction under present law, the size of the court should be fixed by statute.
- D. The number of peremptory challenges should be increased to reflect similar practices in the civilian system.

VII. COUNSEL

- A. The Court endorses the concept reflected in the Joint Services Committee's recommendations for limiting the number of appointed military defense counsel, in most cases, to one. The Court also accepts the Committee's standards for determining when a requested military counsel is "reasonably available."
- B. Similarly, the Court endorses the concept of the Joint Services Committee requiring an affirmative action to appeal a conviction and authorizing counsel to appeal for their clients.
- C. As used in the Code, the term "defense counsel" should be defined to mean "lawyer." This change would require qualified defense counsel at every court-martial and give the judiciary disciplinary control over the defense bar.
- D. In accordance with the recommendation of the 1971 Task Force on the Administration of Military Justice, the concept of a separate defense counsel structure should be implemented in all of the services. As evidenced by the existing practice

within the Air Force and Navy, this change would not require statutory amendment.

- E. Consideration should be given to the concept of establishing a unified bar for attorneys practicing in the military justice system. The military bar association could provide an excellent opportunity for continuing dialogue on the needs of the system. This would enable both the judiciary and the bar to effectively police disciplinary violations. Additionally, the bar association could participate in the activities of a newly created judicial conference (See X.D.)

VIII. COURT OF MILITARY REVIEW

- A. Consideration should be given to amending Article 66 to restructure the Courts of Military Review. A uniservice court would bring more uniformity to appellate decisions and be consistent with a notion that the military justice system is uniform. As with provisions respecting the trial judiciary, procedures should be employed which would insure the independence of the appellate judiciary, e.g., appointment of judges for a specified term of years with removal only for good cause, absence of OER, etc.
- B. Because of the potential for varying caseloads, the statute should maintain some flexibility concerning the size of the Court. However, the statute should specify that the Court may consider cases in panels of three, with a provision for hearing or rehearing en banc.
- C. The Court endorses the Joint Services Committee's recommendation for a system which requires affirmative action by the accused or his counsel to appeal to the Court of Military Review.
- D. To eliminate present uncertainty, the Code should specifically grant extraordinary writ authority to the judges of the Courts of Military Review.

IX. COURT OF MILITARY APPEALS

- A. Under present military practice, the executive branch is vested with the authority to promulgate procedural rules to govern courts-martial. This is more properly a judicial function and, accordingly, the authority should be reposed in the judiciary. Consideration should be given to vesting this power in the Court of Military Appeals. This could be done either by statutory amendment or by presidential delegation under Article 36.
- B. The present system for appointing judges to the Court of Military Appeals requires vacancies to be filled for the remainder of a 15-year term when a judge leaves the Court before the expiration of his term. A change allowing appointment of all new judges for a full 15-year term would make the appointment more attractive thereby encouraging the best possible appointments. Naturally, the present incumbents would be excluded from such a change.
- C. Codification of the supervisory role of the U.S. Court of Military Appeals over the entire system of military justice would insure uniformity and enhance control over the entire system of military justice.
- D. Jurisdiction should be given to the U.S. Supreme Court to review decisions of the U.S. Court of Military Appeals through a petition for writ of certiorari. This would enhance the prestige of the Court of Military Appeals and the system of military justice as a whole and obviate the present need for resort to collateral review under habeas corpus procedures to obtain ultimate Supreme Court consideration.
- E. The present certification procedure of Article 67(b)(2) should be replaced by a provision allowing the government to appeal legal issues from the Court of Military Review to the Court of Military Appeals.
- F. Consideration should be given to adopting a procedure allowing both government and defense interlocutory appeals of specified adverse rulings of the trial court.

- G. Eliminate mandatory review by the U.S. Court of Military Appeals of all cases affecting a flag or general officer. This change would codify the "equal justice under the law" concept without sacrificing any material rights.
- H. As with the recommendation respecting the military trial judges and the judges of the Courts of Military Review, the extraordinary writ jurisdiction for the judges of the Court of Military Appeals should be codified.

X. MISCELLANEOUS

- A. Abolish summary courts-martial. This change could be accompanied by a strengthening of the provision for non-judicial punishment under Article 15. This would have the dual advantage of recognizing the authority of the commander while at the same time eliminating a court which has outlived its usefulness.
- B. Consideration should be given to modifying the provisions of Article 45 to conform to the guilty plea waiver concept enunciated by the Supreme Court in North Carolina v. Alford, 400 U.S. 25 (1970).
- C. A statutory enactment creating a judicial council is recommended. In addition to exercising disciplinary power over counsel and judges, the council would be charged with undertaking a continuous study of the organization, practice, procedure, rules and methods of administration and operation of the military justice system. The council also would make recommendations regarding rules changes to the U.S. Court of Military Appeals. Members of the council should include a judge of the U.S. Court of Military Appeals, the chief judge of the Court of Military Review, three trial judges, two civilian counsel or deans of law schools, and the assistant general counsel to the Secretary of Defense (Manpower, Health & Public Affairs).
- D. A judicial conference on the order of that created by 28 U.S.C. §331-334 (1970) for the federal civilian system should be established for the military justice system. This would

enable the court to meet with members of the military judiciary and bar to consider in an orderly fashion the problems encountered under the system.

APPENDIX XII

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE,
PRINCIPAL ACTIVE AGENDA ITEMS AS OF MARCH 1978

SOURCE: Copy provided the author on 19 May 1978 by the
Criminal Law Division, Army JAG, Washington, D.C.

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JOINT SERVICE COMMITTEE ON MILITARY JUSTICE
PRINCIPAL ACTIVE AGENDA ITEMS
MARCH 1976

1. CONTINUING JURISDICTION COURTS-MARTIAL

a. In response to a suggestion by Chief Judge Fletcher, the Committee proposed a concept of continuing jurisdiction which would establish courts-martial in continuous existence, and not ad hoc bodies created for trials of particular cases. The proposed system would not change Article 15 procedures or the summary court-martial. It would retain the present role of the service Judge Advocates General as the primary supervisors of the administration of military justice, and continue the commanding officer in the critical role of initiating prosecutions.

b. The proposed concept would not create "courts" in existence but would provide for their establishment by service Judge Advocate General action similar to that which established the Courts of Military Review. After cases are referred for trial, the proposed court-martial will have the power to discharge from confinement or dismiss actions. Because military courts do not have jurisdiction over administrative actions, injunctive or prohibitory relief does not appear necessary. The powers of these courts, including the power to grant extraordinary relief, would be enumerated and limited in the legislation.

c. Status: The Code Committee has tentatively approved the concept of continuing jurisdiction. The Air Force is drafting proposed legislation.

2. GOVERNMENT APPEAL

a. In concept, Article 62, UCMJ, would be amended to provide that in any trial by court-martial, over which a military judge presides and in which a punitive discharge may be adjudged, the United States may, under such limitations as the President may prescribe, appeal any order or ruling which terminates the proceedings with respect to a charge or specification or which excludes

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evidence, except that no such appeal shall lie from an order or ruling which is, or amounts to, a finding of not guilty.

b. Status: The Committee has referred proposed legislation for approval by the Code Committee.

3. PARA 127c, MCM, 1969 (REV.)--TABLE OF MAXIMUM PUNISHMENTS

a. The Committee has proposed an amendment to the Table of Maximum Punishments which would establish the following limits for Article 134 drug offenses:

(1) For schedule I and II controlled substances other than marihuana:

(a) Wrongful possession or use: DD, CHL for 5 years.

(b) Wrongful sale, transfer, or possession with intent to sell or transfer: DD, CHL for 10 years.

(2) For schedule III-V controlled substances:

(a) Wrongful possession or use: DD, CHL for 2 years.

(b) Wrongful sale, transfer, or possession with intent to sell or transfer: DD, CHL for 5 years.

(3) For marihuana:

(a) Wrongful possession or use: BCD, CHL for 6 months.

(b) Wrongful sale, transfer, or possession with intent to sell or transfer: DD, CHL for 2 years.

b. Status: The proposal has been approved by the Service Judge Advocates General; an executive order is being drafted.

4. ARTICLE 36, UCMJ

a. The Committee has proposed an amendment to Article 36, UCMJ, to provide that pretrial, trial, and post-trial procedures, including modes of proof, for actions arising under the UCMJ triable in courts-martial, courts of inquiry, military commissions, and other military tribunals may

be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with the UCMJ.

b. Status: The proposed legislation has been forwarded for approval by the Code Committee.

5. JUDICIAL COUNCIL

a. The Committee submitted to the Code Committee a proposal to establish a Judicial Council which would be charged with providing advice on matters referred to it by the Code Committee.

b. Status: The proposal was tabled by the Code Committee in February 1978.

6. ARTICLE 72, UCMJ -- VACATION PROCEEDINGS

The working group of the Committee is studying an Army proposal which would modify vacation practice under Article 72, UCMJ, by allowing the commander to make the discretionary decision to vacate, but requiring the fact-finding hearing to be conducted by a lawyer if available.

7. SENTENCING BY MILITARY JUDGE ALONE

The working group is studying an Army proposal that sentencing be accomplished by military judge alone in every court-martial to which a military judge is detailed.

8. PARA 20c, MCM, 1969 (REV.)--PRETRIAL CONFINEMENT

The working group is studying an Army proposal that paragraph 20c of the Manual be changed to provide that the permissible bases for pretrial confinement are the need to assure the presence of the accused at trial and community safety.

9. ARTICLE 15, UCMJ--NONJUDICIAL PUNISHMENT

The working group is studying an Army proposal to amend Article 15, UCMJ. In general, the proposal vests reduction

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authority from grades E-7, E-8, and E-9 at the general court-martial convening authority level, and eliminates reference to promotion authority in those provisions of the article dealing with reduction authority, and substitutes specified grades from which reduction is permissible.

10. PARAS 120 & 121, NCM, 1969 (REV.)--MENTAL RESPONSIBILITY

The working group is studying changes proposed by the Army to conform paragraphs 120 and 121 of the Manual to U.S. v. Frederick, 3 A.J. 230 (CMA 1977) (All standards of criminal responsibility applies to military practice), and U.S. v. Vaughn, 23 USCMA 343, 49 CMR 747 (1975) (para 120c overruled insofar as it precludes application of the doctrine of partial mental responsibility to the offense of unpremeditated murder).

11. ARTICLE 66(a), UCMJ--EN BANC REHEARING

The working group is studying an Army proposal that Article 66(a), UCMJ, be amended to permit rehearing a panel decision en banc before a Court of Military Review.

12. PARA 153b(2), NCM, 1969 (REV.)--IMPEACHMENT OF WITNESSES

The Army has returned to the working group a proposed change to paragraph 153b(2) of the Manual which would place limitations on the impeachment of sex crime victims.

13. FEDERAL RULES OF EVIDENCE

The Committee is preparing to undertake a comprehensive study of the Federal Rules of Evidence, which will make detailed recommendations regarding those rules feasible for incorporation into military practice.

14. JUDGE COOK'S RECOMMENDATIONS

The working group is studying Judge Cook's recommendations that: (1) Article 62 be amended so as to eliminate the commander's authority to set aside a verdict or to order a new trial while retaining his power to reduce, suspend or commute punishment; (2) Article 2

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be amended to eliminate jurisdiction over the Fleet Reserve and Fleet Marine Corps and relinquish military criminal jurisdiction over all reservists not on active duty; (3) Article 88 be deleted; and (4) abolition of the bad-conduct discharge be considered.

15. CHARGE 2, MCM, 1969 (REV.)

The Committee is staffing the page proofs for an amendment made by Executive Order 12016, 3 Nov 77, which changes the Manual to establish the senior ranking individual (except for medical officers and chaplains) in a prison camp as the lawful superior of all those lower ranking, regardless of branch of service.

APPENDIX XIII

MEMORANDUM FROM CHAIRMAN, JOINT SERVICE COMMITTEE
ON MILITARY JUSTICE, DATED 9 FEBRUARY 1978
REGARDING PRIORITIZATION OF AGENDA ITEMS

SOURCE: Copy of Memorandum given to author on 12 April 1978
by the Criminal Law Division, Army JAG, Washington, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C.



REPLY TO
ATTN OF:

Chairman, Joint Service Committee

9 FEB 1978

SUBJECT:

Activities of the Joint Service Committee

TO: Members, Joint Service Committee

1. The Code Committee met on 1 February 78 to prioritize the Joint Service Committee's agenda items. The following priorities were assigned:

(1) Continuing Jurisdiction. The JSC was tasked with preparing a legislative draft.

(2) Sentencing by military judge. The JSC was tasked with drafting the concept. (Admiral Miller stated that although he was the primary opponent of sentencing by military judge alone, he would be willing to give in if the concept would relax some of the restraints now present. In particular, he referred to the requirement to produce witnesses at the sentencing hearing.)

(3) Article 66(a) (En Banc Decisions). The JSC was tasked to provide a legislative draft.

(4) Article 72 (Vacation Practice). The JSC was tasked to provide a legislative draft.

(5) Article 15 (Authority for reduction of all grades, E-7, 8 and 9). The JSC was tasked to provide a legislative draft.

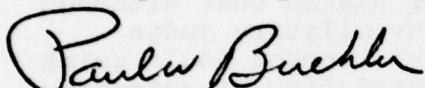
2. Judge Fletcher expressed the view that the court should not get involved in substantive Manual changes since it may be necessary at some future date to rule on their legality. The JSC, without Code Committee action, will draft an Executive Order to change the Manual provisions concerning the Table of Maximum punishment, para 120 and 121 (Mental Responsibility), para 20c (Pretrial Confinement), and para 153b(2) (Impeachment of Rape Victim's testimony).

3. No priority was assigned to the Federal Rules of Evidence Proposal. Review and staffing would coincide with work on the 5 agenda items referenced above. Judge Fletcher stated that he has 5 staff attorneys who are available to work on this proposal. His offer of assistance was accepted. Details as to how and when the working group and COMA's staff will work this item will be decided by myself and Ward Mundy.

4. As for Judge Cook's recommendations, it was agreed that they would take last priority. Judge Cook commented that this was his desire. The JSC will continue to work the problem.

5. Since the amendment to Article 62 and Article 36 are presently before the Code Committee, these items were not assigned any priority.

6. I propose that we tentatively schedule a meeting of the JSC for 2 March to discuss the Code Committee's action and to brief you on my meeting with Ward Mundy.



PAUL W. BUEHLER, Colonel, USAF
Chairman, Joint Service Committee
on Military Justice

APPENDIX XIV

TRANSCRIPT OF TAPE-RECORDED REMARKS
OF A COMPANY COMMANDER REGARDING THE IMPACT
OF THE MILITARY JUSTICE SYSTEM ON HIS OPERATIONS DUTIES

SOURCE: Tape-recorded remarks furnished the author by a commanding officer of a Marine rifle company. Transcript has been edited to protect identity of officer.

TRANSCRIPT OF TAPE-RECORDED REMARKS
OF A COMPANY COMMANDER REGARDING THE IMPACT
OF THE MILITARY JUSTICE SYSTEM ON HIS OPERATIONS DUTIES

My name is Captain_____. I am at present
the Commanding Officer of_____Company_____
Marines. I have been in this billet since_____. Prior to
that I was the Commanding Officer of Company_____
Marines. I held that billet from_____1977 until_____1978.
I would like to express to the Colonel that there is a definite
problem with our legal system. It overburdens and overtaxes a
Commander, and definitely takes away from the combat readiness
of, not only an Infantry outfit, but I'm sure any other organi-
zation here in the FMF. Just to express an opinion, I would
like to say that we spend so much time doing, covering redundant
material that many people are just frustrated. I expressed to
the Colonel during our meeting, Wednesday last, concerning how
I felt, as a general rule, the majority of Senior Staff NCOs
and the Junior Officers that have to deal with the majority of
these problems, are just frustrated, and have no trust in our
legal or judicial system. We feel that during any legal pro-
ceedings, the majority of the time, we are being questioned;
we are being put on trial, vice the man who has committed the
offense. We spend so much time looking into, and making sure
we don't deprive him of his rights under the law, that we
have to continually stand up for ourselves, and we have to
substantiate our actions, which is a totally ridiculous

situation. As Officers, and as Staff NCOs, we should have a special trust and confidence, as Officers and Staff NCOs and whatever we say should be the truth. I am convinced that if an Officer or Staff NCO misuses or breaches a special trust and confidence, he should be dealt with harshly, and immediately removed from any position of authority.

However, we all feel that we are put on trial. As I expressed to the Colonel in my former duty station, _____ . When I was Officer of the Day, a fight started, and after a young man had knocked out the Sergeant and struck the Navy Officer of the day in such a manner that knocked him completely off his feet; as I stepped in to break up the fray. The best way to do it was not to hit the man but grab him by the throat. I was charged with trying to choke the man to death, which was totally ridiculous, and the entire Article 32 of the investigation came about because I was found not to be at fault with any performance of my duties but after we spent a good bit of the Government's money and took, at that time, a Company Commander, a Captain away from his command. But here, in the _____ Marines, when I was the C.O. of _____ Company from _____, looking back through my files I have held 200 office hours, and discharged other than honorable, expeditiously and with GOS 23 individuals. Along with this package, I'll be seeing _____ handwritten statement from the First Sergeant of _____ Company who expresses some of the problems that he had while there, as the

C.O. of _____ Company from _____

_____ I held a total of 23 office hours, which as the Colonel can see, not working on weekends and two of those days on off-duty status and four more of those days in the field, and counting the weekends, there will definitely be more than one judicial proceedings per day. As it is stated here in _____, I have more assets at hand to handle my judicial matters when not continually going to the field and training my units are pretty much separated and do their own things. Communications, motor transport, RS shops of the Battalion, _____ and _____ in my _____ Platoon. I spent a good bit of time trying this out, watching their training and seeing what they are doing, but I have more time to my actual self to sit down and take care of these matters. I spend here at _____ Company, I would say, thirty percent of my time on judicial proceedings. Right now, I am hard-pressed to get this tape out, because there is a discharge package I have to do personally. It concerns an erroneous enlistment of a certain corporal, and the Division is screaming for that package to be up there. So many times we are immediately directed to drop everything we are doing and get into or spend more time on our judicial matters. At _____ Company just speaking with my Executive Officer, who is in a process, right now, of working up a six

other than honorable discharge packages, because of involvement of a discreditable nature with military authorities. He works as fast as he can on the paper work, the things that we should spend more time on, such as pay problems, and the problems dealing with a man's actual service record, so he can have more time to put into discharge packages. My Executive Officer states that he spends, at the time when we have to do these packages, he spends about 60% of his time working on discharge packages. Right now, since we have just come back from a cruise, we have a good number of Marines who should not be allowed to remain in the Marine Corps. Now, once we have, of course, taken action against these Marines, we will have a little slack time. I would say my Executive Officer spends about 60% of his time working on judicial matters, the majority of these being discharge packages. Including my 30% my first Sergeant, who in my opinion, should be of course a Senior Enlisted Advisor, and should also be a leader. The job in the role of the First Sergeant here has degenerated to the point of being a super admin Chief/Legal Clerk vice being the leader that he should be. First Sergeant has no time, whatsoever, to spend with his Marines. He spends the majority of his time looking through the log books in the day before to see what violations were made, and taking care of the charge sheets that are placed on people, researching them, writing up the charges and then telling the individuals beforehand it began, counseling and setting up lawyer appointments,

and so on. I think we have a great loss. We need our Senior Enlisted, especially our First Sergeants who have had a majority of experience to get out there and spend time with the Marines, just as I spend time with the Marines. But the year that I have been in command, close to a year I've been in command here, I have very seldom had a chance to allow my First Sergeant to attend training with our Marines, unless it is absolutely mandatory because of the administrative burden laid on him by our judicial system. It is probably estimated that the number of man hours it takes him at least one hour to spend on each nonjudicial punishment to get it ready. Now this one hour does not include the time spent by the clerk's typing it up. Proofreading it and passing it against the First Sergeant. He has to again proofread it, he has to bring the man before him and inform him of his rights. Under Article 31, talks to him about the book decision, and see if he wants to discuss this with a lawyer. We again lose time; we have slowed down our judicial process. I am a firm believer that you should punish a man immediately after the offense has been committed to assure that that punishment has thereenforcement that it is put there for. Punishment is punishment, we are not here to rehabilitate people. A man does something wrong, he should be made accountable for it. I don't believe in negative leadership; however, I do believe that a man should be held accountable for his own actions. Because of all the lead time written into these judicial matters, he knows exactly what offense he

can commit, and how long it will be before he receives, if any, punishment from this. For instance, if a man is out having a good time on the weekend, and he wants to take a couple of extra days, so if he is UA hypothetically from Monday and Tuesday and returns on Wednesday morning. Now, before I can see him, the First Sergeant will have to prepare the charge sheets, and so on, which will take, usually it takes a day. We are, of course, working on more than one at a time to prepare everything. The following day you bring the man in to begin the counselling. The man will say, "Well, before I go in I would like to speak to a lawyer." Usually we schedule a lawyer for one day a week. So this is Thursday, by the time he decides when to set the lawyer appointment up which causes us another day's delay, and if we can't get a lawyer then, if the unit is set up on a Monday or Friday basis say, we can't see the lawyer on Friday, he would have to see him the following Monday. That is four more days that they are waiting for the man to see a lawyer. He goes in, there is nothing said, he takes and tells them what he is charged with, and all the lawyer advises him of is the differences between requesting a court martial and accepting nonjudicial punishment. He really does not care if he sees his lawyer or not. If he is a bad man and can't be trusted to get him to that lawyer, we have to put another marine on him to take him there. Now, we are talking about just about a week from the time that the offense has been committed. It will be Monday. So after he sees the lawyer on Monday,

usually that takes the majority of an afternoon, I would not be able to see the man until the following morning. The only nonjudicial proceedings would again bring him in. I have to again inform him of his rights and go through the preliminaries which the First Sergeant has already taken care of. I ensure he understands his rights, I ensure that he does not want to demand a trial by court martial. During the nonjudicial proceedings, I have the First Sergeant present, which takes more of his time, I have the Platoon Sergeant present, and I also have any witnesses that know anything about the case, and the man's able to call his witnesses. Not in a UA case, but in an assault charge could tie up the majority of a platoon for an entire half day.

Going back to the UA charge, if I have got the man before me then, I have to ask him whether he pleads guilty or not. Usually if he is going to plead not guilty and come out with some off the wall excuse, which immediately I listen to, of course, and say I judge that he is guilty and for a two-day period of UA I would probably award him, say \$100 fine and fourteen days' restriction, fourteen days' extra duty, which is just about the maximum I can award him. It depends on the rank, of course. At this time, I must inform the man he has fifteen days in which to appeal if he felt that he was dealt with unfairly, that if he is not guilty or that his punishment was too hard. This man knows that if he has already taken, this is Tuesday now, and he returns usually Wednesday

morning, so this is six days from the time he committed the offense. Now he knows that he has got that fifteen days, he immediately goes out and tells the First Sergeant, "I want to appeal the case." So we have to give him fifteen days and any assistance that he needs, which means that the First Sergeant must be available to help this man. The man knows he will wait his fifteen days. Many of them just wait the fifteen days and decide not to submit. By then, that is 21 days since the offense has been committed, and he said, all this time off, he didn't think he needed to do for that 21 days, he knows when he is going to have 14 days he has got to stay with.

Now, we also have to realize that if the man does decide to submit his appeal, it usually will come in on the fifteenth day after it has been staffed and typed by the First Sergeant. It will be presented to me, and I have to sit down among the other things I am doing and write up a rebuttal to this, and inform the Battalion Commander. It usually takes me at least a day to get his prepared, all the other admin work we have to do. And it will take me a day to write mine up, and another day, so we are talking about one or two days, unless I go out and make this a priority, and continue continually rush it. At that time, it will be forwarded to the Battalion Commander and the Legal Officer or written by the Legal Officer and the Battalion Commander looks at it, so we are talking usually here they can take anywhere from two to three weeks. So if we add up the time from the time a man commits the offense, until the

appeal comes back, the number of man hours is phenomenal in this one case. Six days after the offense is committed, the man comes in office hours, 15 days later he submits his appeal and then, usually at a minimum, say two weeks, 14 days later, he receives an answer back from that appeal. The punishment is omitted out. That is adding that real quick here, we are talking a period of thirty five days before the man is punished. This is not uncommon to have this type of proceeding. Again, for instance, I have one with problems of court martial, of course, we spoke about the amount of time lost. Each of us has to hear, if I know a man has been UA, or a man has committed a, say we have a man who commits an assault, stabs a man, so on and so forth, besides just getting him locked up, we have to bring him in, get all the information, all the witnesses at my level. Now, I have to make a complete writeup of this to the Battalion Commander; he has to go through everything that I have already been through. I can't just go in and say, Colonel, this is what happened, this is what you do. The Colonel has to go through all of this at the Battalion level, and he will refer to a special court martial. We will have to take statements from each witness, and all prepared properly. The Legal Officer then forwards this down to _____ who begins their proceedings, hires the man a lawyer and docket the case. It is usually taken us here, unless there is a special interest in the case, anywhere from two to three months, and even more, four or five months to get a man to court martial. During that time

we have problems with the man, he is continuing to see his lawyer, which we have to stop and verify. Usually when these Marines go down to the lawyers, they are lost for a day. If we know we can't trust them to be there, we send the chasers with them. Any witnesses involved in the case have to spend their time there, which takes away, of course, from combat readiness and training. When the case comes into being, is to be held, we are required to spend our time while bringing Marines away from training. There have been instances where the entire leadership personnel of a Platoon was tied up at a court martial. For example, one court martial, it took the Platoon Commander, Platoon Sergeant, Platoon guide, the man's squad leader, fire team leader, to testify against him. And not only them, you had other Marines in the Company which included the First Segeant of _____ and then the man himself usually picks out three or four of his friends to come in on his behalf, which usually takes three or four more Marines which decimate the Platoon and decimate pretty much the leadership personnel from a company. If you were in a field training operation or some type of exercise these Marines' presence is required, which they all should be - you have lost everything you have tried to do for the day. Because of that, usually Courts Martial don't last and are not over with very rapidly, upwards to three or four days if a man continually fights because our lawyers continually make motions whatever

this and that, and we spend a majority of time waiting for the court martial, sitting outside, and it is also happens to us when we are assigned to a court martial board. The lawyers play their games in the court room, and we spend the majority of our time sitting outside on our duffs, instead of leading the Marines that we are getting paid to lead. This creates a definite moral problem, because of the fact that, (1) Of course, when the leaders are not there, there is a tendency to get screwed up or jumbled up, the command presence is not there and the man, really a good Marine, feels that he would rather spend more of our time with our bad Marines. This is an action that I have heard ever since I have been in the Marine Corps and I can definitely identify with it. As a Commander you will spend 90% of your time with 90% of your Marines, and it is the opinion, I think the general opinion, I think I can speak for my fellow Officers, us in the FMF, or outside the legal system that our legal system really doesn't care, as the _____ specified, says that there is no price on justice, well, we want justice to be metered out. I don't think there are any of us who are vindictive or really out to get anybody. Any Officer or Staff who is worth his salt will help a young man if he has made a mistake; he will bring him back and try to reform him. But we feel, especially our defense lawyers, are not out for justice, they are out to make a name for themselves, they are out to get the man off. I have sat in courtrooms where I

firmly believe that the lawyer will
. in the court. I hate to say that our lawyers
have any sense of pride or loyalty or whatever you want to
call it in the Marine Corps, but the majority seem to be
out for themselves. They have no idea what we go through
in the FMF unit; they never have been with us. They come
out of basic school; they go immediately over, and all they
hear is the man's side of the story. Sometimes, I have had
problem children, and I have had a lawyer call and actually
want to know what in the world I am doing, and why I am out
to get this man. Nothing hurts me worse than to have a
fellow to feel that I, or any of my brother Officers here in
the operational FMF, are vindictive enough to think that we
are going to go out and ruin a young man's life. Because
that is not our job. Our job as leaders is to take a man,
and after three or four years, to turn him back to society
as a productive citizen; if not, to keep him here in the
Marine Corps as a productive Marine. Of course, we can't,
I don't want to get on a soap box.

Continuing on, a case in point, a man in _____ Company,
was there who was still in the Marine Corps, and was transferred
to another unit, and was trying to discharge him when they
could get their hands on him. He continually committed
offenses and infractions and violations and I would not allow
it to happen, I held him accountable for each one. The time
the court martial came into being, it was awarded a court in

late June, and continually kept screwing up, even though we couldn't lock him up because he wouldn't go UA. He refused to do anything until we had 28 charges and specifications against the man. Late August he went to trial. By late August a number of the people who had written charges had been discharged or transferred. I had one _____ who was luckily living in _____ and came back to testify. I was not called to testify, nor was my First Sergeant, my Company _____, the _____ all testified. The specific orders that they gave the man specifically were where to be, what to do at a specific time. A case in point is one where a lawyer asked me what I was trying to do to the man to railroad him, and it was felt that well, it is just not understood that at my level, or at the Battalion Commander's level the man was found innocent of all charges, he was found not guilty, when I know, because I heard the testimony, by the people in my office as to what the man did, he was returned to the unit with a clean bill of health, and just came back laughing in everyone's face. The scuttlebutt got back that the Judge, the defense council and trial council just got together and decided that we were trying to railroad this man, so they were going to let him off. We have no repercussions, there is nothing we can do about it, except to sit back and allow it to happen. It is like we are being forced this stuff without being allowed to fight back. It is hard enough at times to keep your temper, you want to go down

to SJA and

My recommendation would be to bring these people out in an operational unit and just let them sit in the office with a Platoon Commander for a two week period, before they go over to SJA again in their work. You know it is said, and it is felt here that law is not even part of our Marine Corps. I don't know who is going to listen to this, and I don't know how much trouble I am going to get into, but I am going to tell it like it is.

As far as discharge packages go, the admin time spent on them is just incredible. I have eight packages on the expeditious discharge program that I have while in _____ Company, only three of those were approved. You go through the rigamarole and work to take care of the packages, and then they are turned down at a higher level, by people who have never seen the man. I am talking about a man who says, "I really want to be a good guy." Eight office hours and maybe a court martial against him. Again, these Marines are pretty much sea lawyers, they can go down to a lawyer. They become again sea lawyers and definitely are a detriment to us here. The time spent after a man has been informed that he is going to be discharged, after the time that he has been informed that he is awaiting a special proceeding; there is really nothing you can do. The man is continually trying to commit as many violations as he can. You can hold office hours, you can continually do that. But he knows there is

really nothing you can do to hurt him. He is left in the unit which continually destroys the morale of those around him. It is harder to continue to feel, week after week, to sleep in the rain and mud and to see some squirrel sit back in the rear barracks, and knowing while he is gone he is going to be breaking into the good Marine's wall lockers, stealing everything they have and just creating as much problem as he can. This continually happens.

Another case in point. I have yet to see a man awarded a BCD and get it out of the court. It is always suspended. He is always given another chance, which he does not want the majority of the time. He wants his BCD, he wants out, so in another two or three months, we have got him back up for a vacation hearing which takes time away from ourselves and the Battalion Commander who has to hold the hearing. And during this time this man knows he has a BCD, he knows there is nothing else you can do to him, so he tries to create as much problem as he can, and they have a definite tendency to drag other Marines down with them. But immediately, at my level, it is bad enough that the young NCO level, at the Platoon Commander level, we are putting our people at a very precarious situation, when a man continually refuses orders. As I say, we can continually run his office hours, these people become very frustrated, it is hard to try to explain to them why we allow this to happen. I personally can't explain why. It is hard for a young man to keep his temper,

not just wanting Immediately, when that happens, our great legal system will jump on the band wagon and try to railroad a young Officer or NCO. And of course, we at our level try to protect these people and then we are known as, I don't know, it is just a vicious cycle. Something needs to be done about it. Again, there is so much time spent on these individuals, as far as chasers go, as far as vehicles go to get them back and forth to appointments; there is continual disciplinary problems and a real negative effect and lessen our leadership positions. Combat effectiveness is lost, and it is lost because we have to put up with it. There is nothing we can do, and immediately when we try to take any action, and maybe start blowing things out of proportion, and goes in and request mast, which ties things up again. A man knows that if he is going to be put up for discharge, all he has got to do is to request mast, and the time it takes for him to get from me to the Commanding General, the discharge package sits, and nothing happens. A man knows that he wants to get his discharge package stopped for a while and keep collecting that pay check, all he has got to do is get himself into more problems, we have got to pull it back and ~~re-do~~ parts of it because he has more office hours or he has more problems or UA status, and actually behooves this man to get himself into more trouble if he wants to get around his discharge package. The amount of time we have to spend reviewing these things, to see that they are letter perfect, and so on, and let's face it, some of our young

officers and clerks and such, we are not by any means legal experts or writers, of course, we spend most of our time with our noses buried in dictionaries, but that takes a good bit of time away from us. Another problem is when a _____ of service discharge is awarded, that man says there is no more you can do to him, and he is going to cause as much problem as he can, and there are problems involved here, as well as with the BCD or any other type discharge, physical, psychiatric, going into discharges, are the matters behind the discharges. BCD, GOS, the expeditious, the man continually has to have a chaser on him, different appointments out of the way, take care of all the different counseling we have to do for him, so we lose more time in combat effectiveness, we lose time while he is in the brig, with vehicles running back and forth. I have a good Marine that has an appointment somewhere, something to benefit him - I could not use a military vehicle. However, I could not walk from the brig, two miles or so, to my office from the brig, for request mast to take care of one of his problems, because we would be mistreating him. Another problem. The brig. They try to use it for rehabilitation, which is ridiculous. The brig is for punishment. The majority of people we put in the brig are there - I think I haven't had a man there in the past year - who has been sentenced to six months in hard labor. Four months is the most I've seen, when usually he only serves three of that, so in a three-month period, and the majority of people that go to the

brig are only there for twenty to thirty days. You cannot, in that time, rehabilitate the man. He should be sent there, he should be punished. Why should a man not want to go to the brig. It is a pretty much old beat up barracks, at the least, it is cold in the winter, hot in the summer, he is in continual problems with other Marines trying to steal what is his, and do as we may, people on duty whatever else may happen; he has to go to the field he has to eat rations, why shouldn't he take a thirty day break to go to the brig? Just walk around and pick up, the hard labor that is done at the brig is definitely nothing compared to what we do in our field training exercises. He goes around and polices up paper, our guards are camouflaging this, he sleeps in a nice air-conditioned temperature controlled building, and eats in the finest mess hall on this base. He also has a good majority of his special service money. I know that probably not even 100% of all the small games, cards, monopoly, scrabble, these type games are sent to the brig for use by the prisoners, instead of being given to the commands here so our Marines can do more if they are off duty time besides go to Jacksonville and get themselves in trouble. But I could go on forever, the only thing that we are requesting, and we are behind you 100% in what you are doing, we are just asking that if there is any way that somebody can do something about the problems that we have. We functioned a long time before, and I am sure a man was afforded the same rights that he has now, but it just wasn't written down

and we didn't have to take care of it. The man was not continually put in a special status. If a man was punished, he was punished. He didn't want to go to the brig, he didn't want to do wrong, because let's face it, there are a certain number of those that serve in our Marine Corps who positive leadership can do nothing for. And sometimes it just takes a hammer to make them win, and to make them perform properly. Actually, there is nothing that we can do to these people. They are not afraid, they are not scared. They know they can come in, they know exactly what they can get away with, what they can't get away with, and how far we can go, how far we can't go, and it is a pretty sad situation, and has a detrimental effect on leadership personnel. We continue to push our recruiting effort. I can guarantee you, if they straighten the legal system out, our recruiting effort would turn for the better.

Again, a young man does not want to see criminals given better treatment than he receives himself, when he is a good man, and let's face it, that is what we are about pushed into doing. The majority of our leaders spend their time with them. Again, one of the biggest problems we have is the Marine Corps First Sergeant, the man who should be a real driving force, the real backbone of the Marines. We need a man whom the troops should look up to, aspire to reach his position. They don't want to do that, all they want to do is sit behind a desk and take care of criminals, and I'm continually asked why we go to seminars? Why we are losing so many, why we are not meeting

our recruiting goals? Why we are not keeping a second term potential career Marine in the Marine Corps. Why he is getting out after his first or second enlistment, is because I really firmly believe our judicial system. It is bad enough in the office, but again, the young NCOs put their stripes on the line every day and continually make them deal with people that should never be here in the first place. I don't think that we have any notion whatsoever, as a whole, about sticking it to a good young man who is, I think, sometimes forced into losing his temper, sometime into doing the things they do, such as striking a man or something, and I think it is our fault as leaders that we will degenerate to the point that we can't take care of our own problems.

Again, the young officers want to leave because they have heard so much about the special trust and confidence in a Marine officer, and this special trust and confidence is continually overridden by the Uniform Code of Military Justice. A case in point: There is a young Lieutenant, during a summary court martial, I gave my testimony, and a lawyer continually questioned me, and I have stopped, and maybe it is nothing bad about it, but I because he was actually sitting there calling me a liar. If I wear the bars, definitely, I am going to speak the truth when I am asked a question no matter what kind of trouble it gets me in, and so many of us, many of the junior Officers feel this way. So many people have become apathetic

about our system that they let the problems go, they won't hold a man accountable until he has done something horrendous before he is brought in for judicial proceedings, he had no faith whatsoever in our judicial system. I feel that we need to do something to restore the trust and confidence we have in our leadership people at the lower level. The majority of the time, people out of our range, leadership types-- Commanders, Division Staff Officers, whatever, whenever they hear the bad side of everything we are doing, instead of the good. Again, there we are standing up in front of some Colonel's desk for something that some PFC alleges that we are doing, and again, it seems that we are continually being put on trial. It is a very sad situation.

I have gone on now, for about 45 minutes. I can think of a whole lot more to say.

because I think it is time somebody starts speaking out. It is time that something is done about our problem, and it is time we continually quit covering up. It is time that we stopped worrying and take care of our problems, meet them head on and do something about them. It is time,

that the Commandant and the Joint Chiefs should know what is going on. One last thing. The amount of punishment metered out. I continually said that we don't hold people accountable for what they do. That is true. I have seen in the past seven years a continual decline in the amount of punishment

handed out for certain offenses, I don't even think that people are punished anymore. They realize that they can get away with anything. As you say, the number of courts martial are decreasing. The only reason the number of courts martial are decreasing are the things that we used to handle at courts martial are being handled in office hours which are totally ridiculous. So you do see the number of courts martial decline, and the reason is that people are not being held accountable, and these people are actually just letting things go, which just makes my skin crawl, because in doing that, we are condoning actions, and we are allowing people go free when they should be punished, and we are destroying our code. We are destroying our esprit de corps, we are destroying the discipline in the Marine Corps when this takes place.

Thank you very much, sir.

APPENDIX XV

RESULTS OF A SURVEY CONDUCTED BY AUTHOR OF THE STUDENTS
ATTENDING THE NAVAL WARFARE COURSE AND THE NAVAL STAFF COURSE,
NAVAL WAR COLLEGE, NEWPORT, R.I., DURING 1977-1978.

**NAVAL WAR COLLEGE
NEWPORT, RHODE ISLAND**

02840

8 May 1978

From: Colonel George L. Bailey, Student, NWC
To:

Subj: Impact of the Military Justice System on Combat
Readiness

Dear

I am presently conducting a research project for the Naval War College's Center for Advanced Research which will attempt to quantify the impact of our military justice system, to include Admin Discharges, upon our combat readiness. The attached questionnaire supports, in part, the research project. Your responses will be kept anonymous; your participation is voluntary but critical to the study.

It would help, but it is not necessary, if you used a number 1 or 2 pencil on the scanner sheet. If you do not wish to answer a particular question, please insure that the answer spaces next to that question number are left blank.

For those in the Naval War College, when you have completed the questionnaire please leave the marked scanner sheet in my mail box or one of the marked boxes located in the mail room or at my cubicle H-45. (Separate arrangements will be made for those not in the Naval War College.)

I would appreciate your comments and ideas about the subject. Thanks for your cooperation.

GEORGE L. BAILEY
COL, USMC

XV-1

1. What is your current rank?
 - a. 0-1 or 0-2
 - b. 0-3
 - c. 0-4 65
 - d. 0-5 80
 - e. 0-6 28
2. If in the Navy, are you:
 - a. Surface Navy 24
 - b. Navy Air 31
 - c. A Submariner 2
 - d. Restricted line of staff officer 10
 - e. Other 3
3. If in the Army or Marine Corps, are you:
 - a. An Infantry Officer 28
 - b. An Aviator 20
 - c. A Tank Officer 6
 - d. An Artillery Officer 8
 - e. Other 18
4. If in the Air Force, are you:
 - a. A Pilot 9
 - b. A Navigator 4
 - c. Non-rated 10
5. What is the aggregate amount of time you have spent, during your career, as a commanding officer?
 - a. none
 - b. Less than one year 18
 - c. Less than three years 58
 - d. Less than five years 32
 - e. More than five years 20
6. What is the aggregate amount of time you have spent, during your career, as a unit legal officer?
 - a. None 109
 - b. Less than six months 16
 - c. Less than one year 19
 - d. Less than two years 21
 - e. More than two years. 8
7. If you have once been a commanding officer, but are not now, what was the highest level of unit you commanded?
 - a. Never commanded 49
 - b. Company/small ship 42
 - c. Battalion/squadron/medium sized ship 77
 - d. Regiment/group/large ship 5
 - e. Not applicable 0

8. If you are presently a commanding officer, what is the level of unit you are commanding?

- a. Company/small ship
- b. Battalion/squadron/medium sized ship
- c. Regiment/group/large ship
- d. Not applicable. 113

9. Approximately how many times have you, during your career, imposed Article 15 punishment?

- a. One or more but less than 10 27
- b. 10 or more but less than 30 32
- c. 30 or more but less than 50 32
- d. 50 or more 39
- e. None. 43

10. Approximately how many times have you, during your career, referred a subordinate to a summary courts-martial?

- a. One or more but less than 10 75
- b. 10 or more but less than 30 22
- c. 30 or more but less than 50 14
- d. 50 or more 3
- e. None. 50

11. Approximately how many times have you, during your career, referred a subordinate to a special courts-martial?

- a. One or more but less than 10 67
- b. 10 or more but less than 30 21
- c. 30 or more but less than 50 7
- d. 50 or more 73
- e. None.

12. Approximately how many times have you, during your career, recommended a subordinate to a general courts-martial?

- a. One or more but less than 5 43
- b. 5 or more but less than 10 4
- c. 10 or more 5
- d. None. 121

13. How many times have you been a summary courts-martial officer?

- a. One or more but less than 5 75
- b. 5 or more but less than 10 22
- c. 10 or more but less than 20 15
- d. 20 or more 3
- e. None. 58

14. How many times have you served on the jury of a special courts-martial?

- a. One or more but less than 5 71
- b. 5 or more but less than 10 23
- c. 10 or more but less than 20 25
- d. 20 or more 15
- e. None. 39

15. How many times have you served on the jury of a general courts-martial?

- | | |
|--------------------------------|-----|
| a. One or more but less than 5 | 33 |
| b. 5 or more but less than 10 | 6 |
| c. 10 or more but less than 20 | 2 |
| d. 20 or more | 2 |
| e. None. | 130 |

16. How many times have you been a trial-counsel at a special courts-martial?

- | | |
|--------------------------------|----|
| a. One or more but less than 5 | 50 |
| b. 5 or more but less than 10 | 15 |
| c. 10 or more but less than 20 | 10 |
| d. 20 or more | 8 |
| e. None. | 90 |

17. How many times have you been a defense counsel at a special courts-martial?

- | | |
|--------------------------------|----|
| a. One or more but less than 5 | 50 |
| b. 5 or more but less than 10 | 18 |
| c. 10 or more but less than 20 | 10 |
| d. 20 or more | 8 |
| e. None. | 87 |

18. If you are presently a commanding officer, approximately what percent of your working day, on the average, do you spend on military justice matters (to include admin discharges)?

- | | |
|-------------------------|-----|
| a. One to 10 percent | |
| b. 11 to 20 percent | |
| c. 21 to 25 percent | |
| d. More than 25 percent | |
| e. Not applicable | 173 |

19. If you are not presently a commanding officer, approximately what percent of your working day, on the average, did you spend at your last command, on military justice matters (to include admin discharges)?

- | | |
|-------------------------|----|
| a. One to 10 percent | 95 |
| b. 11 to 20 percent | 32 |
| c. 21 to 25 percent | 7 |
| d. More than 25 percent | 8 |
| e. Not applicable. | 27 |

20. Of the time you spent or spend on military justice and admin discharge matters, (i.e., based on the answer you gave to questions 18 and 19 above) what portion represented time spent on imposing Article 15 punishment?

- | | |
|------------------------|----|
| a. Less than a tenth | 16 |
| b. Less than a quarter | 13 |
| c. Less than half | 29 |
| d. More than half | 37 |
| e. Not applicable. | 78 |

21. Of the time you spent or spend on military justice and admin discharge matters (i.e., based on the answer you have to questions 18 and 19 above) what portion represented time spent on cases involving admin discharges?

- | | |
|------------------------|----|
| a. Less than a tenth | 53 |
| b. Less than a quarter | 40 |
| c. Less than half | 29 |
| d. More than half | 21 |
| e. Not applicable. | 30 |

22. Of the time you spent or spend on military justice and admin discharge matters (i.e., based on the answers you gave to questions 18 or 19 above) what portion represented time spent on referring/reviewing, etc., cases involving summary courts-martial?

- | | |
|------------------------|----|
| a. Less than a tenth | 97 |
| b. Less than a quarter | 13 |
| c. Less than half | 3 |
| d. More than half | 0 |
| e. Not applicable. | 60 |

23. Of the time you spent or spend on military justice and admin discharge matters, (i.e., based on the answers you gave to questions 18 or 19 above), what portion represented time spent on referring/reviewing, etc., cases involving special courts-martial?

- | | |
|------------------------|----|
| a. Less than a tenth | 74 |
| b. Less than a quarter | 34 |
| c. Less than half | 2 |
| d. More than half | 2 |
| e. Not applicable. | 61 |

24. Of the time you spent or spend on military justice and admin discharge matters, (i.e., based on the answers you gave to questions 18 or 19 above), what portion represented time spent on referring cases to Article 32 investigations, reviewing these reports of investigation, and taking appropriate action based on these reviews?

- | | |
|------------------------|----|
| a. Less than a tenth | 85 |
| b. Less than a quarter | 19 |
| c. Less than half | 5 |
| d. More than half | 3 |
| e. Not applicable. | 61 |

25. Do you believe the balance between the legal rights of the accused and the needs of the command has tilted too far in favor of the accused?

- | | |
|-----------------------|----|
| a. generally agree | 92 |
| b. generally disagree | 39 |
| c. strongly agree | 36 |
| d. strongly disagree | 6 |

26. Which of the following statements best describes your opinion as to the rights of the accused?

- a. Has too few rights 3
- b. Has just enough rights 62
- c. Has too many rights 90
- d. Has far too few rights 8
- e. Has way too many rights. 10

27. Do you believe the military accused should have the right to be represented by a lawyer at an Article 15 proceeding?

- a. Yes 37
- b. No 99

28. Do you believe the military accused should have the right to be represented by a lawyer at a summary courts-martial?

- a. Yes 98
- b. No 75

29. Do you believe the military accused would be better off if the accused's defense counsel cooperated with the accused's commanding officer more than they generally do?

- a. Yes 59
 - b. No 100
- Did not answer 14

30. Do you believe the military accused should have the right to refuse Article 15 punishment?

- a. Yes 117
 - b. No 52
- Did not answer 4

31. Do you believe the military accused should have the right to refuse a summary courts-martial?

- a. Yes 105
 - b. No 59
- Did not answer 9

32. Do you believe the military accused would generally be better off if he could not refuse Article 15 punishment?

- a. Yes 89
 - b. No 75
- Did not answer 9

33. Do you believe the military accused would generally be better off if he could not refuse a summary courts-martial?

- a. Yes 70
 - b. No 95
- Did not answer 8

34. It has been said that a defense counsel for a military accused must, of necessity, treat the accused's commanding officer as an adversary. Do you

- a. generally disagree 60
 - b. generally concur 67
 - c. strongly disagree 31
 - d. strongly concur 8
- Did not answer 7

35. A recent decision of the U.S. Court of Military Appeals (U.S. vs. Booker) held that the military accused must now be advised that he has the right to consult personally with a military lawyer before he decides whether he will accept or refuse NJP or trial by summary court. Do you believe the accused should have this right?

a. Yes	110		
b. No	59	Did not answer	4

36. A recent decision of the U.S. Court of Military Appeals (U.S. vs. Alef) held that a serviceman's off-base use of drugs is not triable by military authorities. Which of the following best describes your opinion with regard to this decision?

a. It will have no adverse impact on military readiness?	34
b. It will have some adverse impact on military readiness?	86
c. It will have great adverse impact on military readiness?	42
d. It will have a favorable impact on military readiness?	3
	Did not answer 8

37. It has been said that a defense counsel should, simultaneously, represent both the accused and the accused's commanding officer. Do you

a. generally concur	14		
b. generally disagree	93		
c. strongly concur	2	Did not answer	8
d. strongly disagree	60		

38. It has been said that military justice does not impact greatly on combat readiness. Do you

a. generally agree	22		
b. generally disagree	74	Did not answer	8
c. strongly agree	3		
d. strongly disagree	66		

39. Do you believe the summary courts-martial should be abolished?

a. Yes	57		
b. No	108	Did not answer	8

40. Do you believe that most commanding officers perceive the present military justice system as being:

a. Generally worth the cost in manhours and resources.	29
b. Presently too costly in terms of manhours and resources.	130

41. Would you like to see line officers assigned as members on the next committee charged with rewriting the military justice system?

a. Yes	151		
b. No	19	Did not answer	3

42. Do you believe most commanding officers trust defense counsel?

a. Yes	73	Did not answer	15
b. No	85		

43. Do you believe most commanding officers trust lawyers in general?

a. Yes	73	Did not answer	12
b. No	88		

44. Do you believe that most commanding officers feel that lawyers have, in the past, done all they could to help the line officer in the performance of his unit's mission?

a. Yes	33	Did not answer	11
b. No	129		

45. Do you believe that most commanding officers understand the adversary legal system?

a. Yes	47	Did not answer	19
b. No	107		

46. Do you believe that most commanding officers feel that military lawyers understand the commanding officer's problems?

a. Yes	33	Did not answer	23
b. No.	117		

APPENDIX XVI

REMARKS BY REAR ADMIRAL WILLIAM O. MILLER, JAGC, USN
JUDGE ADVOCATE GENERAL OF THE NAVY, DELIVERED TO THE
MILITARY ORDER OF THE WORLD WARS, ATLANTA, GEORGIA
15 FEBRUARY 1978

SOURCE: Copy of speech provided author on 12 April 1978 by
Rear Admiral William O. Miller, JAGC, USN, Navy JAG,
Washington, D.C.

Remarks by
Rear Admiral William O. Miller, JAGC, USN
Judge Advocate General of the Navy
delivered to
The Military Order of the World Wars
Atlanta, Georgia
15 February 1978

In just a minute or two, I'm going to be talking about one of the few things which is causing your Navy -- and your Army, Air Force and Marine Corps -- trouble these days.

But before I do, I've been charged with conveying to you the greetings and respect of Secretary Claytor, Admiral Holloway, and General Wilson -- and all 700,000 of us who comprise the Naval Service.

Your sons and daughters, your brothers and sisters, are still part of the greatest and strongest aggregation of sea-going people this world has ever seen.

Our Navy is still the strongest, the most versatile, and the most technically capable sea-going force in the world.

Our sailors are the best educated, and for the most part, the most dedicated, sailors this country has ever produced,

and our Marine stands unique as the fighting man's fighting man -- his motto of just a few good men -- means exactly that.

We have been able to attract our young people in sufficient quantities -- and with quality -- to almost meet our accession goals -- and we are hopeful this next year will see an increase in the numbers of high school graduates which we enlist.

We need 95,000 young enlisted men and women this next year -- and we would like over 75K of them to be high school graduates.

This will take a lot of doing on the part of our recruiters -- since the other services, and industry as well, are interested in this same population.

Whatever help you as individuals -- and as members of this organization -- can be, would be very much appreciated.

Our number for information is: 800-342-5855. Someone is on duty there 24 hours a day.

But -- just a word of caution --

We would much rather these young people finish their high school first.

They will be better able to master the modern, highly technical Navy -- and

They will be better sailors -- or marines -- for us as well as for themselves.

I know our recruiters would like to have the opportunity to tell the Navy story -- and, if you can be of help, just let me know -- and I'll put you in touch with the right people.

We are not an organization totally without problems, however, and my purpose here tonight is to discuss one of these problems with you.

The Washington Post, in a recent article discussing discipline and morale in the Navy, characterized us, discipline-wise, as a "ship taking on water faster than it can bail it out." They went on to say that both

the chief petty officers and the senior line officers who were interviewed agreed that one problem underlying the morale situation was that "Navy leaders are overly constrained from imposing the necessary discipline." This latter observation coincides with complaints I have heard during my inspection trips in the field, and with which I agree, at least in part. It's certainly clear to me that our line commanders and senior petty officers believe that the military justice system has become too slow, too complicated, and too expensive.

And I believe that there is some merit in their view.

Although we certainly are not "taking on water faster than we can bail it out," there are disturbing and distressing trends, readily observable in our disciplinary system, which, if allowed to continue, could cause us serious problems if we ever had to fight another war.

Over the years since 1950, when it first became law, the UCMJ proved to be an essentially sound law which combined protection of the rights of accused persons with a simplified procedure that helped preserve discipline.

In 1975, however, that situation began to change. With increasing frequency, commanders at all levels began to voice bewilderment and concern over the operation of the military justice system. This was expressed not only in letters and personal comments to me, but also in their actions as commanders dealing with disciplinary problems.

Comparing the statistics for calendar years 1974 and 1976, the total discipline rate, which includes all cases processed under the UCMJ, declined in the Navy and Marine Corps by 15 percent. In that same period,

however, the rate of discharges from the Navy issued in lieu of disciplinary action increased by 89 percent.

_ In deciding whether to utilize the military justice system or to simply separate the offender from the Navy, commanders chose with increasing frequency not to use the military justice system.

In my opinion, the frustrations, the additional delays, complexities, and expense which prompted that reaction from the line community are in large part attributable to some recent decisions of our military appellate courts. Some of those decisions, have, in my view, stretched and rent the fabric of the UCMJ to produce results not consonant with either 25 years of prior practice or the intent of the Code's drafters.

Before I describe some of these changes to you, I would like to state very clearly, for all of you to hear, my firm conviction that we can, indeed, we must, have a system of military justice which is fair and equitable to those brought before it. I believe -- and this belief is enforced by my experience as a participant in this system for over 25 years -- that every sailor and every Marine must perceive that he will get a fair shake if brought before our bar -- that his rights to due process will be respected -- that his interests, feelings, concerns, desires, will be given full consideration -- and that the results of the process will be fair.

I think, too, that those 95 percent of our sailors and Marines who comprise the overwhelming majority of our society and who never are directly subjected to the military justice system, need to be assured that

the system not only protects the rights of individual defendants but that it also protects their rights as law-abiding members of society as well --

They need to be assured that our system protects the interests of the aircrew, of the ship, of the station, in being as free as possible from the criminal conduct of others -- in being able to pursue its mission without the interference of those whose conduct detracts -- rather than contributes.

This is the type of military justice system which we need and which we want.

But, I'm afraid that the recent past has seen the pendulum swing overly far toward over-protection of that small percentage of our population that gets in trouble, and that the interests of the military community, at large, are beginning to suffer.

I have especially in mind, here, a line of recent decisions by our highest military appellate court, the Court of Military Appeals, which require our lower military courts to hold that an individual's enlistment is void and that, hence, he is not subject to military law -- even though he wears our uniform, receives our pay, and bears all the other indicia of service affiliation.

In a series of decisions beginning in 1975, the Court of Military Appeals has ruled that, if an individual was not qualified to enlist for any reason, and his recruiter, knowing that fact, enlisted him anyway, the enlistment is void and the individual cannot be tried by court-martial.

Whatever wrong he may have committed is thus beyond the power of the military to redress.

Let me read to you an excerpt from a recent decision of the Navy Court of Military Review which dramatically illustrates the injustice which this rule can create. The accused in this case had been convicted by court-martial of forcible sodomy and indecent assault. Upon appeal he contended, and the Government was unable to rebut, that his recruiter had advised him to conceal his pre-service use of marijuana -- a disqualifying factor if not knowingly waived by higher authority. The court found it necessary to dismiss the charges -- but in doing so, the Chief Judge remarked:

I [also] voice my personal concern that respect for the law and the consequent inclination to conform to it is eroded by decisions such as we here render in applying jurisdictional standards established by decisional law. The victims of these vicious, depraved and humiliating acts, and indeed the entire community governed by the system of military justice can be excused for expressing skepticism, in this case and others similarly decided, that the law provides redress for wrong. Who will vindicate these victims for the degradation they have suffered if the military justice system cannot? The Government's misconduct, even fully conceding what appellant has asserted, is complicity by a recruiter in concealing a waivable impediment to

enlistment. Appellant's acts -- violent, degrading and with a likelihood of long lasting psychological effects to their victims -- are radical departures from societal norms in need of protection. Fairness does not require [such] jurisdictional imperatives. . . .

I also have in mind our new responsibility to provide, free of charge, a judge advocate defense counsel -- from anywhere in the world -- to a military defendant -- regardless of the cost -- provided the judge advocate can be spared from his regular duties for a time -- and if we don't, we must dismiss the prosecution -- even though the accused already has a military counsel appointed and present in court to represent him.

And the requirement that we review the results of a trial, if the accused is in confinement, within 90 days, and if we don't, again we must dismiss the prosecution. This latter one is particularly distressing.

We recently had a case in which our Navy Court of Military Review was forced to dismiss the charges and set the defendant free because the convening authority did not take his action until the 91st day of post-trial confinement. The case involved the stabbing of a serviceman in the throat with infliction of grievous bodily harm. The accused had entered a plea of guilty, the trial was free of any prejudicial error and the charge was serious. Balancing these factors and the rightful expectation of society to be protected by its judicial system, against the actual harm suffered by this defendant, suggests to me that dismissal of the charges which is mandated is a far too drastic remedy. The ultimate loser

is the military justice system, the military community, and, hence, all of us who are a part of it or who depend upon it for the protection of our liberties.

One more, and I'll stop --

It seems to me that if a criminal act committed by one who is subject to military law can be said to have an impact on our ability to maintain order, and hence, on our ability to maintain a ready, effective fighting force, then we should have the legal authority to deal with it.

But our jurisdiction is now being so constrained by our military appellate courts that we are being rendered helpless in the face of an ever increasing drug problem. Under the present judicially imposed rules, a serviceman can flood our bases with illegal drugs, or whatever, by trafficking with fellow servicemen -- even his military superiors -- and perhaps, I suppose, his subordinates -- as long as he is careful to make his plans and consummate his part of the transaction, outside the gate, and we are powerless to act, never mind the ultimate intended use of these substances, and never mind the degradation of our fighting force that such use creates.

These are all rules which our appellate courts have judicially imposed upon us -- rules which, in my view, cry out for correction -- and correction, which, probably can come only in the Congress.

The most serious long-term effect of all of this is the loss of respect which it creates for our criminal law system on the part of

those subject to it. Loss of respect for a system of law attacks and endangers the very fabric of the society which those laws regulate -- for no system can long endure when its legal structure does not command the respect and voluntary compliance of those subject to it. -

Discipline in the Navy, or in any of the Armed Forces -- never has been -- never will be -- never could be -- maintained by force -- just as no police force on earth is big enough to compel the obedience of the crowds you have walking down Peachtree Street every day.

This discipline -- this public order -- is only possible when most voluntarily comply with the rule of law.

And when respect and appreciation for what one's legal system accomplishes is gone -- when the system loses its effectiveness to provide order with a perception of fairness but certainty -- then the will to voluntarily submit one's conduct to it goes as well.

This is why I fear that, if the present trends are not reversed, our military justice system may very well not be up to the responsibilities it must bear, if ever we should have to fight another war.

My answer to these problems lies in legislative changes, which we are now staffing for submission to the Congress -- changes which, I believe, will bring a better balance back into our system.

-- changes which, I believe, will serve to better protect the legitimate needs of our military society as a whole --

and

-- changes which I believe will enhance the respect accorded to our military legal structure,

and, hence, which will

enhance the willingness of the vast majority of our people
to submit their conduct to its constraints.

It is not my purpose, here, to discuss the details of these
proposals, to seek your support for them, or even to suggest to you
that they would be a cure-all for our ills.

But it is my purpose to tell you of our problems so that you, as
individuals, and as an organization vitally interested in the security
of our country, can inquire into these matters further, and so that, if
you wish and if, after studying, you share my concerns, you can make it
known, perhaps even with some solutions of your own.

APPENDIX XVII

MEMORANDUM FROM ARMY JAG TO THE SECRETARY OF THE ARMY,
DATED 24 JUNE 1976 REGARDING RECENT CORRESPONDENCE
WITH CHIEF JUDGE FLETCHER

SOURCE: Copy of letter provided the author on 13 April 1978 from
the Criminal Law Division, Army JAG, Washington,
D.C.



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF:

24 JUN 1976

DAJA-CL 1976/1879

MEMORANDUM THRU: CHIEF OF STAFF

FOR: SECRETARY OF THE ARMY

SUBJECT: Correspondence with Chief Judge Fletcher--
INFORMATION MEMORANDUM

1. On 26 May 1976, Major General Harold R. Vague, The Judge Advocate General, United States Air Force, dispatched the letter at Tab A to Chief Judge Fletcher, US Court of Military Appeals. It responded to comments that Judge Fletcher made at a meeting of the American Bar Association's Standing Committee on Military Law at Langley Air Force Base on 22 May 1976. Major General Persons, who was present, interpreted Judge Fletcher's remarks as did General Vague. At Tab B is a letter to Judge Fletcher from the Chief Counsel of the Coast Guard, in reference to proceedings at a recent conference attended by TJAG's and USCMA judges. These two letters reflect the problems that have arisen as a result of Chief Judge Fletcher's attempted assumption of authority over the TJAG's and his often stated determination to change the Code by judicial fiat. General Persons' policy, and that of the other JAG's, has been to cooperate fully with USCMA judges in seeking enactment of mutually desired amendments to the Code.

2. The above letters do not require any action but I felt that you should be aware of them.

3. For your convenience, at Tab C is an information memorandum about proposals to amend the UCMJ, previously forwarded to you.

3 Incl
Tab A - AF Ltr to Chief
Judge Fletcher
Tab B - CG Ltr to Chief
Judge Fletcher
Tab C - Info Memo dtd
10 May 76

LAWRENCE H. WILLIAMS
Major General, USA
Acting The Judge Advocate General

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C.



26 May 1976

Honorable Albert B. Fletcher, Jr.
Chief Judge, Court of Military Appeals
Washington, D. C. 20442

Dear Chief Judge Fletcher

May I again express my appreciation to you for your appearance at Langley AFB last week. Mrs. Vague and I were delighted at the opportunity to see you and Mrs. Fletcher in a more informal atmosphere than we ordinarily do.

I obviously also listened with more than usual attentiveness to your Law Day speech on Saturday night. Aside from a minor disagreement over the reaction of Kansas turtles to being prodded, I found it most worthwhile.

However, the reaction to a portion of your speech by at least some people was summed up by one listener who said to me, in essence: "I'm not certain that I understood everything that Judge Fletcher said, but I did understand that he was giving the TJAG's hell."

The comment arose, I am certain, from that portion of your talk in which you indicated that 48 proposals for legislative change had been submitted by the court (in addition to TJAG proposals), that a "confrontation" had occurred, and that the only response by the TJAG's was to reduce their original proposals to legislative form.

Aside from the fact that apparently I don't recognize a confrontation when I see one, I was concerned over what I believed to be an erroneous interpretation of our actions. I, therefore, decided to review the bidding.

I reviewed your 15 July 1975 letter attaching the 48 proposals. Of these 48 -

a. At least six of them were already in the TJAG proposals, and in fact your letter only indicated your indorsement of the recommendations of the joint services committee (we are already down to 42 proposals).

b. I count at least 15 more with which I, personally, have no disagreement. However, on a priority scale, I ranked them low - and I am certain you recall my expressed philosophy that we should go to Congress, not with a big package that would probably get nowhere, but with small, well-justified, packages in order of priority. I include in this category such items as the following -

(1) All of your Section II, including recommendations for specific statutory authority for offenses involving kidnapping, illegal orders, military "civil rights" violations, and a codification of offenses under Articles 133 and 134.

(2) Authority for trial judges to punish for "outside" contempts.

(3) Enlarging and fixing the size of courts, and increasing the number of peremptory challenges.

(4) Review of COMA decisions by the Supreme Court.

c. Some of your proposals had already been adopted by the Air Force (e.g., your Section VII D, recommending creation of a separate defense counsel structure).

d. Some of your proposals have been concurred in, in principle, by the TJAG's, but are awaiting a clearer definition of details. For example, I have stated my concurrence in principle with the idea of a statutory judicial council. I was, therefore, surprised to hear you state during your appellate advocacy conference that this proposal was "for all practical purposes dead". I, for one, deny complicity in its death, and a hurried consultation with some of the other TJAG's indicates that they were as surprised as I.

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MILITARY JUSTICE AND COMBAT READINESS.(U)
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e. Some of your proposals did not require statutory change (e.g., the rating of staff judge advocates, a separate counsel system, and a unified bar organization).

I then reviewed your 1 August 1975 letter, in which you stated that you had reconsidered some of the 48 suggestions previously made by you, and you submitted 11 proposals which you considered priority items.

On 11 September 1975, I wrote you a letter expressing some reservations about two of your 11 proposals (tenure of judges and limitation of their functions). Although I have received no reply to this letter, I presume it is a matter for future discussion.

Since you indicated a primary interest in legislation to give continuing jurisdiction to trial courts, the joint services committee is currently working on it. This is obviously not a simple task. I believe I was told last week that the committee had identified some 28 statutory changes that would be necessary just to get to the trial stage. In short, as Judge Cook can tell you, it is sometimes a long road, in the legislative business, from a one-line concept to a finished piece of legislative drafting.

In contrast, the proposals the services prepared had been in the mill some three years. They had a single primary objective - to simplify and streamline proceedings, by making the operation of military appellate proceedings similar to civil court proceedings. To avoid controversy - which could possibly bog down the proposal - no major substantive changes were proposed. The need for streamlining was brought home to us by the Vietnam war, and we believed that it was in accord with Chief Justice Burger's efforts in the civilian field. We also felt that the time was ripe to let lawyers in the field have authority and responsibility commensurate with their civilian counterparts.

Our decision to go forward with our single-objective package while we worked on and sorted out your 48 (or 11) varied proposals was certainly not intended as a "confrontation" or a refusal to listen to "signals". If anything,

it should be considered as a desire not to rush to Congress with proposals that had not been thought through and, therefore, could not be fully justified under congressional scrutiny. I think the fact that you reconsidered some of your original 48 proposals a few weeks after you made them shows the wisdom of this approach.

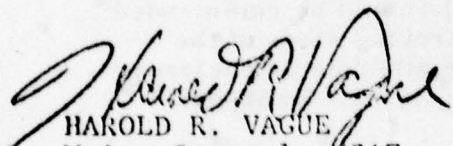
I suppose that the real point of my letter is this: I do not really believe that a confrontation exists between the court and either the military or the TJAG's and I would hope we could avoid any public impression that this is true.

If I have given such an impression, I apologize. If bureaucratic inertia has been mistaken for deliberate foot dragging, I can only say that this is not the first time that the two have been confused.

I simply want to assure you that I hope to work with the court on future legislative changes. If there is disagreement on what changes are appropriate, I am certain that a forum will eventually be provided (probably a legislative committee) in which our respective positions can be fully explored.

Best personal regards.

Sincerely


HAROLD R. VAGUE
Major General, USAF
The Judge Advocate General
United States Air Force



DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

MAILING ADDRESS G-LMJ/81
U.S. COAST GUARD
WASHINGTON, D.C. 20590
PHONE (202) 426-0272

*5800

15 JUN 1976

Honorable A. B. Fletcher, Jr.
Chief Judge, United States Court
of Military Appeals
Washington, D. C. 20442

Dear Judge Fletcher:

I would like to take this opportunity to compliment you, the other Judges of the Court, and the Court staff for the very excellent Homer Ferguson Conference on Appellate Advocacy. The program and speakers were both interesting and thought provoking. I hope that these Conferences will continue.

I was especially interested in that part of the Conference which covered the proposed new Court rules. It is my understanding that the rules were prepared by the staff of the Court and do not necessarily reflect the views of the Court. I appreciate the opportunity of commenting on the proposed rules.

At the outset let me say that the staff of the Court should be commended on the excellent job they did in clarifying and improving some of the existing Rules of Practice and Procedure. I have attached as enclosure (1) hereto my comments on some of the remaining rules. I support those rules on which I have not commented.

There are a couple of general comments I would like to make about the proposed rules in addition to the more specific comments attached. First, I hope that many of the changes do in fact represent only the views of the staff and do not represent the views of the Court. It is apparent to me that the proposed changes represent a view of the present state of military justice in the armed forces which is quite different from my view. I do not see the serious problems which the Court staff apparently does; therefore, I see no need for many of the solutions they propose.

Secondly, I see in many of the proposed changes the underlying concept that the Court has some supervisory power over military justice - a concept for which I find no statutory support. It seems to me that a Court which requires adherence to the letter of the law by the armed forces should itself be scrupulous in adhering to the law. If the Court

Subj: Homer Ferguson Conference on Appellate Advocacy

is to supervise the administration of military justice, then it should be done only under clear authority provided by the Congress.

A third, and related problem with the proposed rules is their expansion of power of the Court into new areas. Again this is being proposed with no new statutory authority on which to base the expansion. Nor is there any demonstrated need for this expansion.

The military justice system in this country is one of the best, if not the best, in the world. It is certainly ahead of the civilian criminal justice system in this country. Therefore, I see little need for the sweeping changes proposed in these new rules.

Thank you for the opportunity to comment on the proposed Rules.

Sincerely,



R. A. RATTI
Rear Admiral, U.S. Coast Guard
Chief Counsel

Encl. (1) Comments on proposed rules



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

10 MAY 1976

SUBJECT: UCMJ Legislative Proposals--INFORMATION MEMORANDUM

1. The Judge Advocates General have been developing a proposal to amend the Uniform Code of Military Justice. Tab A is a copy of the current proposal, drafted in the Air Force, covered by a summary of its contents. The major milestones in its development have been:

-- 26 Jul 74 - Service Judge Advocates General (TJAG's) provided full-time members to the working group of the Joint Service Committee on Military Justice (JSC).

-- 5 Nov 74 - Mandate to prepare legislation given by the TJAG's to the JSC.

-- 28 Mar 75 - First draft of the concept of a legislative package completed.

-- 16 Jun 75 - TJAG's reviewed draft.

-- 21 Jul 75, 28 Oct 75, and 27 Feb 76 - USCMA judges were briefed in an attempt to secure their support for the proposed legislation. During this period, Chief Judge Fletcher, USCMA, proposed over 50 Code changes. At the suggestion of the TJAG's, he reduced these to 15 priority items, which he later reduced to one, for a continuing jurisdiction court-martial. Judge Cook also proposed amendments to the Code.

-- 12 Nov 75 - Air Force, which has the service legislative drafting responsibility, forwarded proposals in legislative form.

-- Nov-Dec 75 - Changes to the legislative package were evaluated by the JSC.

-- 28 Jan 76 - Air Force forwarded amended legislative proposals to the other services for comment.

-- 27 Apr '76 - Chief Judge Fletcher informed the TJAG's that USCMA "does not specifically oppose or accept any of the changes as proposed."

DAJA-CL 1976/1845

SUBJECT: UCMJ Legislative Proposals--INFORMATION MEMORANDUM

2. The major features of the proposed legislation are:

-- An accused will normally be authorized one military counsel from his service. The service secretaries may prescribe regulations defining "reasonable availability" of requested individual military counsel.

-- The staff judge advocate's pretrial advice will be legal conclusions; the post-trial review may be either written or oral and deals with appropriateness of the sentence as contrasted with the legality of the proceedings.

-- A complete record of trial will be required only in cases:

° involving an approved sentence of death or affecting a flag or general officer

° where an accused, convicted contrary to his plea, receives an approved sentence of dismissal, discharge, or confinement at hard labor for one year or more, and files a notice of appeal.

-- A record of trial only so complete as is necessary to resolve the issues raised by the accused on appeal shall be prepared in a guilty plea case involving an approved dismissal, discharge, or confinement at hard labor for one year or more.

-- Upon request of the accused, a convening authority may take clemency action within 10 days after announcement of sentence. A 30-day extension may be granted for an accused to obtain supporting documents.

-- Except in limited circumstances, a notice of appeal must be filed by an accused or his conviction becomes final at the trial level.

-- Ordinarily, execution of a discharge will be accomplished on the 41st day after sentence is announced if no appeal is taken.

-- The TJAG's under a Article 69 review of a GCM case may take corrective action without sending a case to a Court of Military Review.

3. The legislative proposals are in my office for comment. Our proposed response includes recommendations that:

-- Proposed Articles 54, 61, 66, 71, and current Article 67 be amended to eliminate the preferential appellate treatment

DAJA-CL 1976/1845

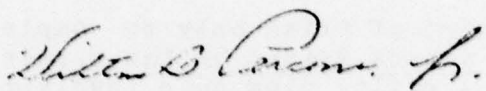
SUBJECT: UCMJ Legislative Proposals--INFORMATION MEMORANDUM

accorded to general and flag officers. Chief Judge Fletcher's opinion is that the change is needed to increase the appearance of fairness and equity in our judicial system. All the TJAG's have informally concurred.

-- Article 15 be amended to eliminate the right to demand trial by court-martial in areas designated by President based on operational requirements or isolation of units.

4. The TJAG's anticipate periodic submission of changes to the UCMJ and Manual for Courts-Martial. Work has already begun on the next legislative package. It will include consideration of some of the suggestions made by Chief Judge Fletcher and Judge Cook. The JSC has already begun work on his concept of continuing jurisdiction. Tab B, prepared by the JSC for its analysis and discussion, illustrates the complexity of the concept.

2 Incl
as


WILTON B. PERSONS, JR.
Major General, USA
The Judge Advocate General

CF:
GC, DA

APPENDIX XVIII

MEMORANDUM FOR THE RECORD, DATED 31 MARCH 1978
REGARDING RESULTS OF AIR FORCE ATTEMPT TO MEASURE
EFFECT OF MILITARY JUSTICE SYSTEM ON COMBAT READINESS

SOURCE: Copy of Memorandum for the Record provided the
author by the Criminal Law Division, Air Force JAG.

MEMORANDUM FOR RECORD

31 March 1978

SUBJECT: Meeting on JAG-Support Project

1. On Monday, 27 March 1978, Colonel Wiegand, Mrs. Landrum, LtCol Kuhnell(JAG), and Captain Gregory (DPXHLM) met with sixteen Air Force officers attending the National War College to discuss approaches to study the JAG's concerns with the impact of various Military Court of Appeals (MCA) decisions upon mission readiness. The meeting was arranged by Colonel Don Stuckel, the senior Air Force officer at the college.

2. Colonel Wiegand briefly discussed SA's role in this study and introduced Lt Colonel Kuhnell. He explained that the JAG is concerned whether CMA decisions which protect accused persons' rights in the areas of court jurisdiction, pre-trial confinement, expeditious trial, search, availability of witnesses, and post-trial detention may have eroded command authority to the point of impacting upon personnel readiness to perform their mission during times of emergency.

3. In the discussion which followed these introductory comments, the following points were made by the group:

a. Commanders most likely do not perceive these CMA decisions as directly affecting readiness.

b. The awareness of any potential impact of CMA decisions upon readiness is masked by the existence of an administrative discharge system which gives commanders flexibility in handling cases in such a way as to avoid the formal judicial system.

c. The judicial decisions are most likely going to remain in effect. We will have to live with them; therefore, the administrative discharge system should be protected.

4. A draft questionnaire (copy attached) was given to eleven of the officers who had been commanders. This questionnaire was formulated based upon the JAG's concerns and prior to our becoming aware of the commanders' reliance upon the administrative discharge system. Responses varied widely reflecting the varied experience of the respondents. In general, respondents either did not know or did not view the CMA limitations as having a substantial impact upon a unit's morale and discipline.

5. Although we suspect that similar responses would be obtained from current commanders in the field, it would be instructive to talk to commanders at bases where there is a high judicial

action rate, e.g., the Northern tier of US bases. We are now working on the details of carrying out such interviews.

6. Even if we find that the existence of the administrative discharge system permits commanders to avoid grappling with the implications of CMA decisions, and thereby precludes our gathering information which measurably surpasses speculation, this in itself will be an interesting finding both for the DP people and the JAG people. The original JAG concern was not stated as an assertion to be documented, but as an hypothesis to be investigated.

/s/ KARL L. WIEGAND

KARL L. WIEGAND, Colonel, USAF
Chief, Analysis and Evaluation
Group
Assistant Chief of Staff,
Studies and Analysis

1 Atch
Questionnaire

BACKGROUND INFO

YOUR GRADE

HOW MANY UNITS HAVE YOU COMMANDED?

TOTAL LENGTH OF TIME SERVED AS COMMANDER?

IN WHAT MAJCOM(s) DID YOU SERVE IN A COMMAND POSITION?

1. What is the largest number of Air Force members over whom you have had command/managerial responsibility in an organizational entity?

Officers

Airmen

Civilians

2. What was the role of the organization?

- a. Flight operations
- b. Flight support
- c. Other support.

3. Have you had to deal at any time with an offense in which there was a question of court-martial jurisdiction for an off-base offense?

- a. Yes
- b. No

4. If yes, how many?

- a. Equal to or less than 5
- b. Equal to or less than 10
- c. Equal to or less than 15
- d. Greater than 15

5. If yes, what was the nature of the offense?

- a. Drug related
- b. An offense by one Service member against other
- c. Other; specify -

6. If yes, in what percent of cases was jurisdiction given to civilian, off-base authorities? Give an estimate between 0 and 100 percent.

7. Based on your experience, judgment, and knowledge of the men in your unit, what percent do you believe would resort to committing a civil offense off-base and accepting civil punishment in order to avoid being shipped out for duty in a combat zone? (Estimate 0-100 percent)

8. Have you had to deal with a case where the question of pre-trial confinement arose?

a. Yes

b. No

9. If yes, how many?

a. Equal to or less than 5

b. Equal to or less than 10

c. Equal to or less than 15

d. Greater than 15

10. If yes, in what percent of cases did you determine that pre-trial confinement should be imposed? (0-100%)

11. Of those cases in which you determined pre-trial confinement should be imposed, in what percent were you actually able to impose pre-trial confinement?

12. In general, what impact do you believe an inability to impose pre-trial confinement upon an accused would have on your unit's overall ability to perform its mission?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

13. How many cases have you had in which the charges against an accused had to be dropped because he could not be brought to trial within the required 90 days of having been placed in pre-trial confinement?

14. Regardless of your answer to 13, what impact would you say such an event would have on your unit's morale and discipline?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

15. Have you ever ordered or conducted searches of persons or places under your jurisdiction?

- a. Yes
- b. No

16. What impact upon discipline would there be if you were prevented from making such searches?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

17. Have you ever used or authorized the use of drug-detection dogs?

- a. Yes
- b. No

18. What impact would limitation of the use of such dogs have upon your ability to maintain discipline?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

19. What impact would you say that limitation on the admissability of the product of a shakedown inspection have upon your ability to maintain discipline?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

20. What impact would limitation of the use of foreign searches have upon your ability to maintain discipline in your unit?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

21. In general, the failure of a material witness to be able to give testimony in a pre-trial hearing or in a trial, in person, could lead to dismissal of the charges. What impact do you believe this condition has upon your ability to maintain discipline?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

22. If an accused is placed in confinement after trial, the convening authority must promulgate his final action on the case within 90 days or the case may be dismissed. What impact might such dismissal have upon your ability to maintain discipline?

- a. None
- b. Slight
- c. Moderate
- d. Substantial

APPENDIX XIX

MEMORANDUM (MINUS ENCLOSURE)
FROM ADMIRAL J. L. HOLLOWAY III, U.S. NAVY,
DATED 8 SEPTEMBER, 1977, TO ALL FLAG OFFICERS
REGARDING RECENT DECISIONS OF THE COURT OF MILITARY APPEALS

SOURCE: Copy of letter furnished author on 5 January 1977
by Senior Marine Officer, Naval War College, Newport,
R. I.



CHIEF OF NAVAL OPERATIONS

Ser 00/000394
8 September 1977

MEMORANDUM FOR ALL FLAG OFFICERS

Subj: Flag Officer Newsletter, 8-77

1. This FONL encloses the text of an address which the Judge Advocate General of the Navy recently presented to the Judge Advocates Association Annual Convention. RADM Miller's remarks address the traumatic changes in military justice which have recently been dictated by an activist Court of Military Appeals.
2. I consider RADM Miller's remarks to be important, cogent and timely and I encourage you to share them with your commanders and commanding officers who are most affected by the practical consequences of the activist role of the present Court of Military Appeals. I believe your commanders and commanding officers should know that we in Washington understand the problems which these decisions are creating for command and they should know that the Judge Advocate General of the Navy has publicly called upon the Court of Military Appeals to heed the legitimate needs of our military society.
3. I also enclose a brief description of the statutory basis and present composition of the Court of Military Appeals.

J. L. Holloway
J. L. HOLLOWAY III
Admiral, U.S. Navy

Enclosure

APPENDIX XX

DIGEST OF GAO REPORT TO ELIMINATE USE OF
ADMINISTRATIVE DISCHARGES IN LIEU OF COURTS-MARTIAL

SOURCE: Report to the Congress by the Comptroller General
of the United States, dated 28 April 1978.

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

ELIMINATE ADMINISTRATIVE DISCHARGES
IN LIEU OF COURT-MARTIAL:
GUIDANCE FOR PLEA AGREEMENTS
IN MILITARY COURTS IS NEEDED

D I G E S T

Plea bargaining in the military involves the exchange of a guilty plea for reduced charges or a specific maximum sentence. As used in this report, it also includes exchanging an admission of guilt to an offense punishable by a bad conduct or dishonorable discharge imposed by a military court for the assurance that the accused will not be brought to trial but instead will be administratively discharged. One result of this bargaining, an agreement to reduced charges or a specific maximum sentence, is subject to review and approval by a military judge. But bargaining which results in discharges in lieu of court-martial is done much more frequently and is not subject to judicial safeguards.

The Uniform Code of Military Justice--the sole statutory authority establishing the means and processes to use in dealing with military people accused of crimes (see p. 3)--does not cover plea agreements or discharges in lieu of court-martial; nor are they addressed in the Manual for Courts-Martial, in which the President establishes procedural rules. (See pp. 4 and 17.)

Disparities in service policies and regulations governing the results of plea bargaining mean that people charged with the same crimes often do not have the same rights which inevitably leads to differing treatment. (See p. 31.) Also, the option of a discharge in lieu of court-martial allows similar cases to be disposed of either administratively or under the judicial process. This further contributes to the nonuniform treatment of individuals and is contrary to congressional intent. (See p. 26.)

The Congress intended that all criminal offenses be dealt with under the provisions of the Uniform Code of Military Justice. (See

pp. 4, 13, 14, and 15.) This is necessary to safeguard the rights of the accused and to protect the interests of society as a whole.

The services use the discharge in lieu of court-martial as an expedient way to get rid of problem people. But the legislative history of the Uniform Code of Military Justice does not support that the Congress intended this to be done in instances involving criminal offenses. In GAO's opinion, the administrative discharge system should be used only to discharge from the service individuals who clearly demonstrate they are unqualified for retention, not to dispose of alleged criminal offenses.

Accordingly, GAO recommends that the President, in the Manual for Courts-Martial, provide policy guidance, procedures, rules, standards, and format on the use of plea agreements in military courts. Any restriction on the use of plea agreements should be specified.

GAO further recommends that the Secretary of Defense

- revise the directive on administrative discharges to eliminate discharges in lieu of court-martial and
- direct the services to dispose of criminal charges in a manner consistent with the Uniform Code of Military Justice and the Manual for Courts-Martial. (See p. 29.)

DISCHARGES IN LIEU OF COURT-MARTIAL

Discharges in lieu of court-martial have increased dramatically from less than 500 in 1967 to almost 27,000 in fiscal year 1976. About 90 percent result in the most severe type of administrative discharge--a discharge under other than honorable conditions. Although not designated punitive, this discharge can have the same effect in terms of restricting eligibility for veteran benefits and limiting civilian employment opportunities. (See pp. 17 and 18.)

A discharge in lieu of court-martial can only be imposed at the request of the accused and upon approval by the discharge authority. In requesting this type of discharge, the accused waives his right to protections guaranteed under the Uniform Code of Military Justice, which include the right to trial and appellate review. Before a discharge can be imposed by a military court, charges must be filed and legally admissible evidence must be developed to judicially establish the person as guilty beyond a reasonable doubt. Punitive discharges (bad conduct and dishonorable) can only be imposed by special and general military courts and do not become effective until reviewed and approved by a court of military review. (See pp. 19 and 20.)

The Congress has warned against the use of the administrative discharge system to impose punishment. If an administrative discharge is not punishment, then the discharge in lieu of court-martial does not allow for any form of punitive action. GAO believes this does not serve the interests of society. It is also unfair to those who are criminally charged with similar offenses but are forced to face court-martial. (See p. 27)

Military courts appear far more hesitant to impose punitive discharges than are discharge authorities to approve requests for discharges, which are potentially as harmful. GAO's test of 1,094 cases showed that a punitive discharge was included in the sentences imposed in 13 percent of the cases tried by court-martial. In contrast, 92 percent of those opting to be discharged in lieu of court-martial received a discharge under other than honorable conditions. (See pp. 24, 25, and 26.)

Many cases, in which a discharge in lieu of court-martial was approved, may never have gone to trial or may have been tried in a court which did not have the authority to impose a punitive discharge. (See p. 26)) This is because service regulations do not require that

--a decision be made to refer the case to a court having the authority to impose a punitive discharge before a discharge can be requested or

--a strong case be developed against the accused before a discharge in lieu of court-martial can be approved. (See p. 27.)

GAO believes that discharges in lieu of court-martial:

--Limit the effectiveness of military courts. These courts must enforce the law and also protect the rights of individual service members. They cannot accomplish these objectives if a major portion of criminal offenses are dealt with outside the judicial process.

--Allow symptoms of a problem to be treated rather than its root cause. This possibility for misuse is of concern because of the increasing rate at which this type of discharge is being used..

Most offenses leading to discharges in lieu of court-martial are peculiar to the military. The majority of those affected by the stigma of a bad discharge are young people--most below age 20. GAO questions whether many of the people electing a discharge in lieu of court-martial understand its potential long-term consequences. (See pp. 28 and 29.)

PLEA AGREEMENTS IN MILITARY COURTS

The Army, Navy, and Marine Corps encourage the use of plea agreements in military courts based on the belief that they are advantageous to both the Government and the accused.

The Air Force disagrees, however, and permits their use only in exceptional circumstances. In doing so the Air Force has created an important policy difference among the services. (See pp. 31 and 32.)

Military appellate courts have approved the use of plea agreements in military courts but have expressed the need for caution. Problems found by these courts support the need for the President to establish policy guidance for the use of plea agreements.

AGENCY COMMENTS

GAO did not obtain formal agency comments. However, the report was discussed with Department of Defense and service judge advocate general representatives. They generally agreed that uniform guidance covering the use of agreements in military courts would be useful. The reaction was mixed, however, regarding GAO's proposal to discontinue the administrative separation of individuals to avoid trial by court-martial. Some supported its discontinuance because it compromises the process by which the Congress intended criminal offenses should be dealt with. Others voiced concern that its elimination would increase the workload of military courts.

APPENDIX XXI

PROPOSED LETTER TO HOUSE SPEAKER, THOMAS P. O'NEILL, JR.
CONTAINING SUGGESTED LEGISLATION TO PERMIT
FURTHER APPEAL OF MILITARY CASES TO THE SUPREME COURT

SOURCE: Copy of proposed letter provided the author on
11 April 1978 by Captain R.L. Pclasek, Code JAM,
Headquarters, Marine Corps, Washington, D.C.



OFFICE, CHIEF OF
LEGISLATIVE LIAISON

DEPARTMENT OF THE ARMY
OFFICE OF THE SECRETARY OF THE ARMY
WASHINGTON, D.C. 20310

Honorable Thomas P. O'Neill
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Inclosed is a draft of legislation "to amend Chapter 81 of title 28, United States Code (Judiciary and Judicial Procedure) to provide review by the Supreme Court of the United States for decisions of the United States Court of Military Appeals."

This proposal is a part of the Department of Defense Legislative Program for the 95th Congress, and the Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this proposal for the consideration of the Congress. The Department of the Army has been designated the representative of the Department of Defense for this legislation. It is recommended that the proposal be enacted by the Congress.

Purpose of the Legislation

The Supreme Court of the United States by writ of certiorari reviews the decisions of federal courts in criminal cases, except those of the United States Court of Military Appeals. Review by certiorari of the Court of Military Appeals decisions is desirable to insure proper and complete resolution of constitutional issues in the military justice system. As the Supreme Court has recognized the expertise of the Court of Military Appeals, it would be appropriate as well as efficient to provide direct review of its decisions by the Supreme Court rather than perpetuate a system of indirect review through collateral attacks on military convictions.

"The Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation" provided to Congress for 1974 indicates that the services tried 47,813 courts-martial. Of that number, 5,330 were reviewed by Courts of Military Review. During this period, 1,417 cases were docketed with the United States Court of Military Appeals. Nevertheless, there should

be no large increase in the workload of the Supreme Court. Few military cases include the type of issues which would lead to issuance of a writ of certiorari. Even though few military cases would come before the Supreme Court, their impact would be great in view of the many military cases tried.

The Chief Judge of the United States Court of Military Appeals, Albert A. Fletcher, Jr., has proposed the enactment of similar legislation.

A B I L L

To amend Chapter 81 of title 28, United States Code (Judiciary and Judicial Procedure) to provide review by the Supreme Court of the United States for decisions of the United States Court of Military Appeals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Chapter 81 of title 28, United States Code (Judiciary and Judicial Procedure) is amended by adding at the end thereof the following new section:

"1259. Court of Military Appeals; certiorari

Cases in the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari."

SEC. 2. The chapter analysis is amended by adding thereto:

"1259. Court of Military Appeals; certiorari."

APPENDIX XXII

2ND MARINE DIVISION POLICY MEMORANDUM,
DATED 18 NOVEMBER 1976 SETTING FORTH TRAINING GUIDANCE

SOURCE: Official Records of 2nd Marine Division, Camp
Lejeune, N.C.



UNITED STATES MARINE CORPS
2D MARINE DIVISION (REIN), FLEET MARINE FORCE
CAMP LEJEUNE, NORTH CAROLINA 28542

IN REPLY REFER TO
6/KM/hta
18 Nov 1976

POLICY MEMORANDUM 7-76

From: Commanding General
To: Commanding Officers, General and Special Staff Officers
Subj: Training Policy Guidance

1. As Marines, our purpose in being, when not involved in combat, is to be prepared for such commitment on short notice. Realistic training in peacetime is the major factor in accomplishing our mission in war. However, the planning for and conducting of realistic and effective training is not a simple task. In fact, it is probably our most difficult assignment but training is our business and we must constantly strive to develop a degree of professionalism in our training which challenges our Marines physically and mentally and rewards them through their sense of accomplishment.

2. An analysis of our training program has been made in an attempt to determine the best method of attaining readiness and developing challenges within the limitations imposed by personnel turbulence and monetary restraints. It revealed a need for a comprehensive training plan. As a result, the Training, Employment and Exercise Plan (TEEP), a plan which establishes training objectives for the Division for an 18-month period commencing 1 January 1977, has been developed and will be promulgated in the near future. Additionally, the plan will provide guidance for where we are going, how we will get there, and what our status will be at the end of the period.

a. Where are we going? (What we want from our training?):

(1) Our first priority will be continued emphasis on amphibious training.

(2) We must maintain the capability to operate in extended land campaigns.

(3) We must be prepared to operate in mid-level intensity combat.

(4) We must establish and maintain the capability to operate in a wide series of environs, weather and terrain.

b. How will we get there? (Which techniques, training methods and organization/type of training offer the most effective and efficient use of available resources?):

(1) Individual training will be conducted to prepare individual Marines to perform specified duties and tasks related to MOS and assigned billet.

(2) Our plan will include type training for all units; infantry, artillery, tanks, engineers, etc.

(3) Integrated training will be emphasized to further improve our mechanized/infantry capability, our air/ground operations and our overall techniques of fire support coordination.

(4) Joint training with other U. S. forces will be conducted on a selective basis and when directed by higher authority.

(5) Combined training with allied forces will be conducted as directed by higher authority.

c. What will our status be at the end of the period? (What will the 2d Marine Division look like on 1 July 1978?):

(1) Physically conditioned. Continued emphasis will be placed on physical training to achieve this end.

(2) MOS qualified. Every effort will be made to train in those fundamentals necessary to ensure that our Marines are fully qualified within their respective MOS's.

(3) Suitably equipped. Funds will be sought and allocated to ensure that the best possible weaponry and equipment are in hands of Marines of this Command.

(4) Our Marines will be disciplined and confident of their ability to accomplish any assigned mission.

3. In the training program analysis conducted I was disturbed to learn that the Division has less than 50% participation in field training. I consider this unacceptable and we must take steps to correct this situation. A separate study has been conducted to determine areas in which relief from certain external requirements which preclude personnel from being available for training might be instituted. Additionally, it is necessary that commanders at all levels review their local requirements and ensure that every available Marine participates in field training.

4. As a result of the analysis of the overall status of training in the Division, I am convinced that the most logical approach to the problem is through block training. This concept calls for blocks of training designed to satisfy intermediate training objectives. The blocks will be progressive in nature commencing with the basic fundamentals and ranging through advanced phases of training. Block training will be administered primarily at the rifle company level but will be conducted in special instances at battalion level. It is my desire that during the next year we increase our capability to accomplish block training and eventually, as much as one-half of our training may be effected through the block concept with the remainder left to the discretion of individual commanders. I am also interested in seeing renewed emphasis in concurrent training. It seems to me that through judicious planning and selection of subject materials by commanders that much of our basic training requirement could and should be accomplished concurrently with other scheduled periods of training.

5. In summary, I reiterate that training Marines is the most important undertaking we have in the Division. It is incumbent upon each of us to make a concerted effort to prepare and conduct all training to the best of our abilities. The forthcoming Training, Employment and Exercise Plan prescribes a realistic approach to the problem and a method of blending all variables into the program. I want commanders at all levels involved in training - planning, execution and evaluation. I am confident that, through incorporation of the basic troop leading steps into our program, we will improve our quality and increase our participation. Moreover, we will overcome all of the variables and in so doing fit them into an equation which equals readiness for combat.

K.M. McLennan
K. MCLENNAN

APPENDIX XXIII

MEMORANDUM, DATED 27 OCTOBER 1976 CONTAINING REVIEW
OF THE AREAS AND REQUIREMENTS WHICH IMPACT
ON TRAINING WITHIN THE 2ND MARINE DIVISION

SOURCE: Official Records, 2nd Marine Division,
Camp Lejeune, N.C.

UNITED STATES MARINE CORPS
2D MARINE DIVISION (REIN), FLEET MARINE FORCE
CAMP LEJEUNE, NORTH CAROLINA 28542

3/GJO/rcp
1500
27 Oct 1976

MEMORANDUM

FOR: COMMANDING GENERAL
FROM: ASSISTANT CHIEF OF STAFF, G-3

SUBJ: REVIEW OF THE AREAS AND REQUIREMENTS WHICH IMPACT ON
TRAINING WITHIN THE 2D MARINE DIVISION

1. IN ACCORDANCE WITH YOUR INSTRUCTIONS, A STUDY HAS BEEN
CONDUCTED OF THOSE AREAS AND REQUIREMENTS WHICH IMPACT
UPON MARINES PARTICIPATING IN NORMAL TRAINING. THE TWO PRINC-
IPAL SOURCES FROM WHICH THE VARIOUS DATA, DISCUSSION, IDEAS
AND CONSIDERATIONS CONTAINED IN THIS REPORT STEM ARE AS
FOLLOWS:

A. REPORTS, DOCUMENTS AND PUBLICATIONS AVAILABLE WITHIN
THE DIVISION: I.E., T/O'S, MORNING REPORTS, INSPECTION
REPORTS, G-1 STUDY ON NON-T/O INTERNAL BILLETS AND G-3
STUDY ON SCHOOLS.

B. INTERVIEWS AND DISCUSSIONS WITH REGIMENTAL/BATTALION
COMMANDERS AND STAFF OFFICERS AND COMPANY COMMANDERS/EXECU-
TIVE OFFICERS.

2. THIS REPORT TAKES INTO CONSIDERATION THE AREAS AND RE-
QUIREMENTS AFFECTING THE TWENTY (20) INFANTRY COMPANIES OF
THE 2D AND 6TH MARINES CURRENTLY LOCATED AT CAMP LEJEUNE.

THE STATISTICS HEREIN REFLECT THE SITUATION EXISTING DURING THE PERIOD 19-22 OCTOBER 1976. WHILE THE NUMBERS CONTAINED IN THIS STUDY CANNOT BE LABELED AS PRECISE IN EVERY INSTANCE THEY ARE REPRESENTATIVE OF EXISTING CONDITIONS WITHIN THE DIVISION AND PROVIDE A SOLID BASIS FOR FURTHER STUDY AND CONSIDERATION IF NOT FOR DEFINITE DECISIONS. THIS REPORT, IN MY ESTIMATE, CAN BEST SERVE AS A STIMULUS FOR FURTHER DETAILED STUDY OF SPECIFIC AREAS AND NOT AS A DECISION PAPER.

H. G. GLASGOW

REPORT

1. GENERAL STATEMENT. THE OBJECTIVE OF THIS STUDY WAS TO PUT TOGETHER A REPRESENTATIVE INFANTRY COMPANY OF THE 2D MARINE DIVISION BY ANALYZING TWENTY COMPANIES, USING CONDITIONS EXISTING DURING THE PERIOD 19-22 OCTOBER 1976, AND DETERMINING THOSE AREAS WHICH PREVENT MARINES FROM PARTICIPATING IN NORMAL TRAINING. ALL AREAS AND REQUIREMENTS WHICH DETRACT FROM TRAINING WERE CONSIDERED, ANALYZED AND DISCUSSED WITH REGIMENTAL, BATTALION AND COMPANY OFFICERS. THE FACTS AND STATISTICS THAT WERE ACCUMULATED DURING THE STUDY ARE NOT SURPRISING TO THIS OFFICER, HOWEVER, SOME OF THE COMMENTS AND ATTITUDES OF THOSE OFFICERS WORKING AT THE BATTALION/COMPANY LEVEL WERE DISCOURAGING. THE FOLLOWING QUOTES WHICH WERE ECHOED DURING DISCUSSIONS WITH THESE OFFICERS PERTAIN:

- A. "LEAVE US ALONE AND LET US TRAIN."
- B. "WE DO IT TO OURSELVES."
- C. "THE PROBLEM IS BIGGER THAN ALL OF US."
- D. "THE FURTHER YOU GET FROM THE PROBLEM, THE LESS SEVERE IT APPEARS."
- E. "DE-CENTRALIZE....."

I THINK WHAT THEY REALLY MEAN IS - HELP! THE BATTALION/COMPANY COMMANDERS ARE SAYING, "GIVE ME THE MISSION AND THE ASSETS TO ACCOMPLISH THE MISSION AND I'LL DO THE JOB, BUT UNDER THE

EXISTING CONDITIONS MY HANDS ARE TIED."

2. DATA. THIS PARAGRAPH CONTAINS A STATISTICAL ANALYSIS OF THE DIVISION DIRECTED TOWARD PORTRAYING THE IMPACT OF VARIOUS REQUIREMENTS AND COMMITMENTS ON NORMAL TRAINING:

A. 2D MARINE DIVISION OVERALL - 22 OCT 76:

	<u>OFF</u>	<u>SNCO</u>	<u>ENL</u>
T/O	943	1194	14208
M/L	896	1145	13711
JD CHG	947	1079	14083

B. AVERAGE INFANTRY BATTALION - 22 OCT 76:

	<u>OFF</u>	<u>SNCO</u>	<u>ENL</u>
T/O	45		1035
M/L	43	50	944
JD CHG	43	44	881
AVAIL	39		823

C. AVERAGE INFANTRY COMPANY - 22 OCT 76:

	<u>OFF</u>	<u>SNCO</u>	<u>ENL</u>
T/O	6	7	182
M/L	6	7	176 (97% of T/O)
JD CHG	5		155
AVAIL	4		121

D. MAJOR OUTSIDE COMMITMENTS - 22 OCT 76:

	<u>OFF</u>	<u>SNCO</u>	<u>ENL</u>
FAP	11	8	238 (G-1 MEMO 10 AUG)
SCHOOLS	47	37	580
NON T/O INT	66	93	186
TOTAL	124	138	1004

E. REPRESENTATIVE INFANTRY COMPANY - 22 OCT 76:

	<u>OFF</u>	<u>ENL</u>
JD CHG	5	155
UA		3
CONF		3
IHCA/IHMA		1
FAP		2
TAD	1	15
HOSP		1
NO/LIGHT DUTY		3
LEAVE		5
SP LIB		1
TOTAL NON EFF	<u>1</u>	<u>34</u>
TOTAL EFF	4	121
COHQ	1	14 (EXCLUDING CO, GYSGT, RADIO OPERATOR)
DUTY		8 (5-16)
IN/OUT		4
MESSMEN		6
WORKING PARTY		5
FST TRNG		16
LEGAL MATTERS		2 (BOARDS, REQUEST MAST, ETC.)
G-5 PROGRAMS		2
MED/DENT APP		1
AVAIL FOR TRNG AS UNIT		63 (40% of JD CHG)

F. THREE SPECIFIC EXAMPLES OF INFANTRY COMPANIES
(ENLISTED ONLY).

	<u>#1</u>	<u>#2</u>	<u>#3</u>
JD CHG	141	111	265
TRNG W/UNIT	57 (40%)	18 (16%)	19 (7%)
NOT AVAIL	84	93	246
UA	4		5
CONF	8	3	2
IHCA		1	1
FAP	2	2	1
TAD	10	10	23
HOSP	1	2	2
NO/LIGHT DUTY	8	4	3

	<u>#1</u>	<u>#2</u>	<u>#3</u>
LEAVE	4	8	5
SP LIB	1		
APP LEAVE		2	
<hr/>			
IN/OUT	9	1	16
DIV LEGAL	1	1	
PE BOARD	1	1	
CHASERS	1	3	
WORKING PARTY	6	8	
SPORTS			15
GED		4	
FST	4	3	153
MESSMAN	6	6	6
DUTY	7	7	7
CO HQ	9	5	7
RR		22	
DENTAL	2		

3. DISCUSSION

A. THE STATISTICAL ANALYSIS ABOVE POINTS OUT THAT THE AVERAGE INFANTRY COMPANY, ON A NORMAL DAY, CAN EXPECT TO HAVE 40% OF THE JD CHG'S AVAILABLE TO TRAIN AS A UNIT. THE EXAMPLE OF THE SPECIFIC COMPANIES ILLUSTRATE THAT IN REALITY THE 40% FIGURE IS HIGH AND IN ALL CASES OTHER REQUIREMENTS FURTHER DEplete FROM THE NUMBER OF MARINES TRAINING AS A UNIT. THESE OTHER REQUIREMENTS INCLUDE INTRAMURAL SPORTS, FST TRAINING, RIFLE RANGES, OTHER TRAINING EVOLUTIONS, MESS DUTY, DUTY PERSONNEL, COMPANY ADMINISTRATIVE PERSONNEL, ETC. THESE MARINES ARE INCLUDED IN THE NUMBER OF MARINES AVAILABLE FOR TRAINING; BUT ALTHOUGH SOME ARE TRAINING, NONE ARE TRAINING AS PART OF THE UNIT. THIS FACT RAISES THE QUESTION OF CATEGORIES WHEN DEALING WITH INFANTRY COMPANIES AND THE

NUMBER OF MARINES TRAINING. THE FOLLOWING THREE CATEGORIES SHOULD BE CONSIDERED:

- (1) THE NUMBER AVAILABLE FOR TRAINING
- (2) THE NUMBER INVOLVED IN TRAINING
- (3) THE NUMBER TRAINING AS A UNIT

USING THE THREE SPECIFIC CASE STUDIES ILLUSTRATED IN PARAGRAPH 2F ABOVE WE CAN SEE THE DIFFERENCES IN THE THREE CATEGORIES.

<u>COMPANY</u>	<u>JD CHG</u>	<u>AVAIL</u>	<u>%</u>	<u>TRNG</u>	<u>%</u>	<u>TRNG W/UNIT</u>	<u>%</u>
#1	141	103	73	61	43	57	40
#2	111	79	71	43	39	18	16
#3	265	223	84	187	71	19	7
TOTALS	517	405	78	291	56	94	18

THE ABOVE MATRIX POINTS OUT THE DIFFERENCES IN THE THREE CATEGORIES. THE PERCENTAGES ON EACH CATEGORY ARE IN RELATION TO THE JD CHG FIGURE. LOOKING AT THE FIGURES FROM ANOTHER VIEWPOINT, USING THE POPULATION OF 517 MARINES, EIGHT (8) OF EVERY TEN (10) MARINES ARE AVAILABLE FOR TRAINING. OF THE EIGHT (8) AVAILABLE FOR TRAINING, FIVE (5) PARTICIPATE IN SOME TYPE OF TRAINING, HOWEVER, ONLY TWO (2) ARE TRAINING AS PART OF THE UNIT. IT IS MY OPINION THAT THE OBJECTIVE OF THIS DIVISION SHOULD BE TO TRAIN OUR MARINES AS A UNIT, THEREFORE, THE FOLLOWING PARAGRAPHS DISCUSS THOSE AREAS WHICH PREVENT MARINES FROM TRAINING WITH THEIR UNIT.

B. THREE MAJOR AREAS

(1) THE THREE AREAS OF FAP, SCHOOLS, AND NON-T/O INTERNAL BILLETS ARE A TREMENDOUS DRAIN ON THE ASSETS OF THE 2D MARINE DIVISION. EACH DAY THE DIVISION HAS 124 OFFICERS, 138 SNCO'S AND 1004 ENLISTED MARINES DEDICATED TO THESE REQUIREMENTS. THE NUMBERS ALONE ARE STAGGERING BUT AN ANALYSIS OF THE NUMBERS SHOW THAT THESE COMMITMENTS ARE MORE COSTLY IN TERMS OF LEADERSHIP. WHILE THE NUMBER OF ENLISTED IS SLIGHTLY MORE THAN THE M/L FOR AN INFANTRY BATTALION (944), THE NUMBERS OF OFFICERS AND SNCO'S WOULD STAFF THREE INFANTRY BATTALIONS. FOLLOWING IS A BRIEF SYNOPSIS OF THESE MAJOR COMMITMENTS:

(A) FAP. THE AC/S, G-1 MEMORANDUM OF 10 AUG 76 ESTABLISHED THE DIVISION REQUIREMENT AT 11 OFFICERS, 8 SNCO'S AND 238 ENLISTED MARINES.

(B) SCHOOLS. TIME DID NOT ALLOW FOR DETAILED STUDY OF CURRENT SCHOOL REQUIREMENTS, HOWEVER, AT THE TIME THIS STUDY WAS CONDUCTED THIS DIVISION HAD 47 OFFICERS, 37 SNCO'S AND 580 ENLISTED MARINES ATTENDING SCHOOL.

(C) NON T/O INTERNAL BILLETS. ACCORDING TO A STUDY RECENTLY COMPLETED BY THE AC/S, G-1 THE FOLLOWING INFORMATION CONCERNING NON-T/O INTERNAL BILLETS WAS FORWARDED TO CG FMFLANT (CG 2D MARDIV 241810Z SEP 76).

ORG	FD GR	CO GR	SNCO	ENL	TOT	
					OFF	ENL
ADMIN SEP		1	1	4	1	5
AD PRO SCHOOL		2	3	3	2	6
CONG CORRESPONDENCE		1		1	1	1
PERS STATS		1			1	
FORSTAT		1			1	
DIV NCO SCHOOL		1	9	6	1	15
MTU*		1	8	13	1	21
DIV MIMMS CENTER		1	2	3	1	5
G-5	3	1	4	10	4	14
ASST DIV INSP	1	*1			2	
CUST REC FUND		1			1	
CEO SP PROJECTS		1			1	
DIV MT SCHOOL			1	4		5
DIV RECEPTION CENTER			1	5		6
FSTU		6	28	28	6	56
CAMP GEIGER SUP	1	1	2		2	2
LANT NBC SCHOOL		1	2	4	1	6
34 MAU	3	2	2	21	5	23
32 MAU	2	2	3	3	4	6
38 MAU	2	2	3	3	4	6
4 MAB	8	9	16	50	17	66
12 MAB*	6	4	4	11	10	15
LANT COMM SCHOOL			4	17		21
TOTALS	26	40	93	186	66	279

THE STUDY WHICH PROVIDED THESE NUMBERS DEALT WITH ONLY THOSE AREAS WHICH WERE REQUIRED BY HIGHER HEADQUARTERS OR WHICH COULD BE JUSTIFIED BECAUSE OF EXISTING REQUIREMENTS TO RESPOND TO HIGHER HEADQUARTERS WITH INFORMATION ON A RECURRING BASIS. HOWEVER, THERE ARE NUMEROUS OTHER REQUIREMENTS WHICH FALL INTO THIS CATEGORY --- NON - T/O INTERNAL BILLETS - WHICH ARE A CONSTANT DRAIN ON MANPOWER AND TAKE MARINES FROM THE FIELD. THESE REQUIREMENTS INCLUDE:

1 TEC REQUIREMENTS. THESE REQUIREMENTS ARE RECURRING AND CAUSE MARINES TO BE ABSENT FROM THEIR UNITS ANYWHERE FROM ONE WEEK TO 90 days. RECURRING REQUIREMENTS INCLUDE, BUT ARE NOT LIMITED TO THE FOLLOWING:

- a. PALM TREE EXERCISES
- b. SOLID SHIELD
- c. NATO CRUISE
- d. ORI/TACTEST
- e. FSC EXERCISE

2 AREA GYMS. EACH AREA COMMANDER IS RESPONSIBLE FOR THE GYM IN HIS RESPECTIVE AREA. IF THESE GYMS ARE GOING TO PROVIDE OUR MARINES WITH THE RECREATIONAL FACILITIES WE WANT, THEN THEY MUST BE PROPERLY EQUIPPED, MAINTAINED AND MANAGED. NORMALLY THIS FUNCTION TAKES ONE NCO AND 6-8 ENLISTED MARINES. THESE MARINES ARE TAD FROM THE INFANTRY BATTALION TO THE REGIMENTAL HEADQUARTERS COMPANY AND WORK FOR THE REGIMENTAL SPECIAL SERVICES OFFICER ON A FULL TIME BASIS.

3 LEGAL PERSONNEL. NON-T/O LEGAL PERSONNEL RUN ALL THE WAY FROM DISCHARGE CLERKS IN THE INFANTRY COMPANIES TO THE REGIMENTAL LEGAL OFFICER AND HIS ASSISTANTS. ADDITIONAL PERSONNEL ARE NEEDED IN THIS AREA BECAUSE OF THE WORKLOAD INVOLVED IN ADMINISTERING OUR LEGAL SYSTEM AND IN PROCESSING ADMINISTRATIVE DISCHARGES. I WOULD ESTIMATE THAT EACH INFANTRY BATTALION HAS ONE (1) OFFICER, ONE (1) SNCO AND SIX (6) ENLISTED MARINES WORKING SOLELY IN THIS AREA.

4 GUARD CHIEFS. ONE (1) SNCO PER REGIMENT TO PROVIDE CONTINUITY TO THE AREA GUARD.

5 CAREER PLANNER. EACH INFANTRY BATTALION HAS ONE NCO FILLING THE BILLET OF CAREER PLANNER. ALTHOUGH THIS BILLET IS LISTED AS AN ADDITIONAL DUTY BY T/O, IT IS A FULL TIME JOB FOR THAT INDIVIDUAL ASSIGNED.

(2) THE AREAS OF SCHOOLS AND NON-T/O INTERNAL BILLETS ARE FOREMOST IN THE MINDS OF THOSE COMMANDERS ECHOING THE "WE DO IT TO OURSELVES" PHILOSOPHY. JUST AS IMPORTANT AS THE NUMBER OF MARINES COMMITTED TO THESE AREAS IS THE TYPE AND QUALITY OF THE INDIVIDUAL AND THE RESULTING TURBULENCE. EVERY REQUIREMENT HAS MINIMUM STANDARDS WHICH MUST BE MET BEFORE AN INDIVIDUAL IS ACCEPTABLE, THEREFORE, THE UNIT DOES NOT JUST LOSE A MARINE THEY LOSE A "GOOD MARINE."

C. COMPANY HEADQUARTERS ELEMENTS. THIS AREA IS OFTEN OVERLOOKED WHEN ANALYSING THE PERSONNEL OF INFANTRY COMPANY. THE PERSONNEL OF THE COMPANY HEADQUARTERS FALL INTO THE CATEGORY OF AVAILABLE FOR TRAINING BUT SELDOM PARTICIPATE. THE CURRENT T/O - 1013M of 18 JUNE 1976 - PROVIDES FOR THE FOLLOWING COMPANY HEADQUARTERS:

	<u>OFF</u>	<u>ENL</u>
CO	1	
XO	1	
1ST SGT		1
GYSGT		1
SUPPLY SGT		1
PERSONNEL CHIEF		1
UNIT DIARY CLERK		1
PERSONNEL CLERK		1
MESSENGER		1

TOTAL: 2 OFFICERS AND 7 ENLISTED

THE NORMAL COMPANY HEADQUARTERS WITHIN AN INFANTRY COMPANY IS DOUBLE THAT PRESCRIBED BY T/O. AS A RESULT OF MY DISCUSSIONS WITH COMPANY COMMANDERS AND EXECUTIVE OFFICERS I HAVE CONSTRUCTED BELOW A TYPICAL HEADQUARTERS FOR AN INFANTRY COMPANY:

	<u>OFF.</u>	<u>ENL</u>
CO	1	
XO	1	
1ST SGT		1
GYSGT		1
PERSONNEL CHIEF		1
UNIT DIARY CLERK		2
PERSONNEL CLERK		1
FILES/DIRECTIVES CLERK		1
DISCHARGE/LEGAL CLERK		1
CORRESPONDENCE CLERK/TYPIST		1
DISBURSING CLERK		1
MESSENGER/RUNNER		1
TRNG NCO		1
SUPPLY NCO		2
ARMORER		2
TOTALS	<u>2</u>	<u>16</u>

D. FOOD SERVICE/AREA GUARD. WITHIN THE DIVISION THERE IS A REQUIREMENT FOR EACH REGIMENT TO OPERATE A DINING FACILITY AND AN AREA GUARD. MOST UNITS UTILIZE THE UNIT INTEGRITY CONCEPT TO HANDLE THESE COMMITMENTS AND ROTATE THE RESPONSIBILITIES AMONG UNITS OF THE REGIMENT. THE PROBLEM ENCOUNTERED IN USING THE UNIT INTEGRITY CONCEPT IN THAT AN INFANTRY COMPANY THAT CAN ONLY MUSTER 40% OF THE JD CHG'S FOR UNIT TRAINING USUALLY REQUIRES AUGMENTATION TO HANDLE FOOD SERVICE/AREA GUARD COMMITMENTS BECAUSE THE 40% DOESN'T MEET THE REQUIREMENT. THIS AUGMENTATION NEGATES THE VALUE OF THE UNIT INTEGRITY CONCEPT. BOTH THE 2D AND 6TH MARINES HAVE FOUND IT NECESSARY TO UTILIZE TWO INFANTRY COMPANIES TO FULFILL THE FOOD SERVICE/AREA

GUARD COMMITMENTS UNDER THE UNIT CONCEPT. AT PRESENT BOTH REGIMENTS LEAN TOWARD THE UNIT INTEGRITY CONCEPT FOR AREA GUARD BUT ARE RETURNING TO THE QUOTA SYSTEM FOR PROVIDING MESSMEN. THE NUMBERS OF MARINES INVOLVED IN THESE COMMITMENTS ARE AS FOLLOWS:

(1) AREA GUARD. THIS REQUIREMENT RANGES FROM 35-65 MARINES DEPENDING UPON THE METHOD OF RUNNING THE GUARD. A COMPANY IS NORMALLY ASSIGNED TO GUARD DUTY ON A MONTHLY BASIS. THE DIFFERENT METHODS UTILIZED AND THE APPROXIMATE MEMBERS ARE:

- (A) RUNNING GUARD.....35
- (B) FOUR RELIEFS.....53
- (C) PORT AND STARBOARD.....65

(2) FOOD SERVICES. THE MESSMEN REQUIREMENT TO OPERATE A REGIMENTAL DINING FACILITY VARIES ACCORDING TO THE NUMBER OF MARINES THAT SUBSIST IN THE FACILITY. ONE REGIMENT WITH ALL THREE BATTALIONS IN GARRISON OPERATE USING FOUR (4) MESSMEN PER COMPANY. THE TOTAL COMMITMENT REACHES 63 WITH EACH BATTALION PROVIDING ONE NCO. THE SECOND REGIMENT HAS TWO BATTALIONS IN GARRISON AND, USING THE UNIT CONCEPT, OPERATES WITH 1 OFFICER AND 46 ENLISTED.

E. FST. THE REQUIREMENT TO TRAIN FIELD SERVICE TRAINEES AT THE REGIMENTAL LEVEL IS A CONSTANT DRAIN ON MANPOWER AND TIME. THE TIME DEVOTED TO THE TASK BY THE REGIMENTAL S-3

OFFICER IS CONSIDERABLE AND DETRACTS FROM HIS PLANNING FOR AND MANAGEMENT OF NORMAL TRAINING EVOLUTIONS. THE DRAWONE ON MARINES COMES IN THE FOLLOWING AREAS:

- (1) FST'S IN TRAINING
- (2) FST'S AWAITING TRAINING
- (3) FSTU STAFFS (SEE PARAGRAPH 3B)
- (4) UNIT OFFICERS/NCOS INVOLVED AS OIC'S AND PLATOON SGT'S
- (5) SUPPORT PERSONNEL TO INCLUDE DRIVERS, ARMORERS, CLERKS, RANGE SAFETY OFFICERS, AND RADIO OPERATORS

F. BARRACKS SECURITY. EACH INFANTRY COMPANY HAS THE REQUIREMENT FOR LOCAL BARRACKS SECURITY ON A CONTINUAL BASIS. THIS SECURITY ELEMENT IS NECESSARY, AND PERHAPS MOST IMPORTANT, WHEN THE UNIT IS TRAINING IN THE FIELD OR OUTSIDE THE CAMP LEJEUNE TRAINING AREAS. THE NUMBER OF MARINES ASSIGNED BARRACKS SECURITY DUTY ON A NORMAL DAY VARIES GREATLY WITHIN THE DIVISION. THE MINIMUM REQUIREMENT PER COMPANY IS FOR EIGHT (8), BROKEN DOWN AS FOLLOWS:

DUTY NCO	1
ASSIST DUTY NCO	1
BARRACKS SENTRIES	6

G. SHORT FUZE EVENTS. IN MY DISCUSSION WITH BATTALION/ COMPANY OFFICERS THE AREAS WHICH SEEM TO IRRITATE THEM MOST ARE THOSE WHICH REQUIRE IMMEDIATE ACTION ON A SHORT-FUZE BASIS. NOT ONLY DO THESE EVENTS ADVERSELY IMPACT ON THEIR NUMBER OF

MARINES IN TRAINING BUT THEY ALSO DISRUPT UNIT TRAINING PLANS/ SCHEDULES AND LEAVE THE SMALL UNIT COMMANDER WITH THE IMPRESSION THAT HE CAN'T DO ANYTHING ON HIS OWN. EVENTS WHICH FALL INTO THIS CATEGORY INCLUDE BUT ARE NOT LIMITED TO:

- (1) QUICK FILL SCHOOL QUOTAS (SNCO ACADEMY)
- (2) LAST MINUTE SCHEDULE CHANGES (AAF, CD COMMITMENTS)
- (3) TESTING PROGRAMS (MCI)
- (4) CAREER PLANNER (HQMC) INTERVIEWS
- (5) INVENTORIES (SPECIAL SERVICES, BASE CONTROLLED)

4. CONCLUSIONS/CONSIDERATIONS. AS THE RESULT OF THE INFORMATION GAINED DURING THIS STUDY THE FOLLOWING CONCLUSIONS AND CONSIDERATIONS FOR FUTURE ACTIONS ARE OFFERED:

A. THAT A DETAILED STUDY OF THE AREAS OF SCHOOL REQUIREMENTS AND NON-T/O INTERNAL BILLETS IS REQUIRED. THIS STUDY SHOULD BE MADE WITH THE VIEW TOWARD REDUCTION OF SCHOOL QUOTAS AND THE ELIMINATION OF NON-T/O INTERNAL BILLETS.

B. THAT UNDER THE EXISTING CONDITIONS AN INFANTRY COMPANY CANNOT ATTAIN THE GOAL OF 50% JD CHG'S AT UNIT TRAINING ON A CONSISTENT BASIS.

C. THAT THE OPERATIONAL TEMPO OF THIS DIVISION MUST BE SLOWED DOWN TO ALLOW ADEQUATE TIME FOR EFFECTIVE TRAINING.

D. THAT THE DRIVE IN THIS DIVISION SHOULD BE TO CREATE AN ENVIRONMENT CONDUCIVE TO UNIT TRAINING. A SOLID PLAN SHOULD BE PRODUCED BY THIS HEADQUARTERS WHICH PROJECTS ALL TRAINING, EMPLOYMENTS AND EXERCISES. THIS PLAN SHOULD BE PUBLISHED FOR 18 MONTH CYCLE, BE COMPLETE WITH REALISTIC OBJECTIVES AND BE

ADHERED TO RELIGIOUSLY. CHANGES AND ADDITIONAL COMMITMENTS *should* ~~MUST~~ *be resisted by this HQ and unit commanders be* BE ABLE TO PLAN AND EXECUTE IN ACCORDANCE WITH THIS PLAN WITH NO OUTSIDE INTERFERENCE. THE PLAN SHOULD SCHEDULE BLOCK TRAINING FOR HALF THE UNIT'S TRAINING TIME LEAVING THE REMAINING HALF FOR THE COMMANDER TO TRAIN AS HE DESIRES.

E. THAT THE UNIT CONCEPT SHOULD BE STRESSED FOR ALL TRAINING EVOLUTIONS AND, WHERE POSSIBLE, UTILIZED TO MEET TRAINING/SUPPORT REQUIREMENTS SUCH AS AREA GUARD, FOOD SERVICE, RIFLE RANGE, ETC. THAT BLOCKS OF TRAINING, ORIENTED TOWARD ALLOWING AN INFANTRY COMPANY TO TRAIN AS A UNIT WITHOUT INTERFERENCE, SHOULD CONTINUE TO BE ESTABLISHED, SCHEDULED AND MANAGED BY THIS HEADQUARTERS.

F. THAT IN INSTITUTING BLOCK TRAINING WE KEEP IT IN THE PROPER PROSPECTIVE AND NOT ALLOW BLOCK TRAINING TO BECOME AN END IN ITSELF. OUR OVERALL OBJECTIVE MUST REMAIN TO PROVIDE MORE READY, BETTER TRAINED MARINES AND UNITS TO MEET OUR STANDING COMMITMENTS AND CONTINGENCIES.

G. THAT A CONSCIENTIOUS EFFORT IS BEING MADE BY COMMANDERS AT ALL LEVELS TO UPGRADE THE LEVEL OF TRAINING AND TO MAINTAIN THE ESTABLISHED STANDARD FOR PARTICIPATION IN TRAINING. STEPS ARE BEING TAKEN TO REDUCE ADMINISTRATION, SUPPORT AND SECURITY PERSONNEL IN THE INTEREST OF GETTING MORE MARINES TO THE FIELD. HOWEVER, WHILE THESE EFFORTS MAY RESULT IN A FEW MORE MARINES GETTING TRAINED, IT WILL TAKE DRASTIC ACTION BY THIS HEADQUARTERS BEFORE A SIGNIFICANT IMPROVEMENT CAN BE REALIZED. THIS ACTION

MUST BE OF SUCH CONSEQUENCE THAT THE ATTENTION OF THE ENTIRE DIVISION IS ATTUNED TO THIS PROBLEM.

5. RECOMMENDATIONS

A. THAT THE NUMBER OF NCO SCHOOL CLASSES PER YEAR BE REDUCED FROM FOURTEEN (14) TO SEVEN (7), AND THE TIME SAVED BE USED BY THE NCO SCHOOL STAFF TO DEVELOP AND PRESENT CERTAIN PERIODS OF BLOCK TRAINING.

B. THAT A DETAILED STUDY BE CONDUCTED OF THE AREAS OF SCHOOL REQUIREMENTS AND NON-T/O INTERNAL BILLETS, WITH THE VIEW TOWARD REDUCTION OF SCHOOL QUOTAS AND NON-T/O INTERNAL BILLETS.

C. THAT CONSIDERATION BE GIVEN TO REDUCING ADMIN PROCEDURES SCHOOL. THAT THE PERSONNEL NOW STAFFING THIS SCHOOL BE COMBINED WITH THE NCO'S FROM THE DIVISION RECEPTION CENTER TO FORM A DIVISION SUB-UNIT WHICH WOULD HANDLE, PROCESS AND ADMINISTER ALL RETURN DESERTERS AND ADMINISTRATIVE SEPARATIONS THUS RELIEVING THE COMPANY COMMANDER OF TREMENDOUS BURDEN.

D. THAT COMMANDERS AT ALL LEVELS BE DIRECTED TO STREAMLINE THEIR HEADQUARTERS/ADMIN ELEMENTS LIMITING THESE SECTIONS TO MINIMUM NECESSARY DURING NORMAL PEACETIME ENVIRONMENT.

E. THAT A REVIEW BE MADE OF THE G-5 SECTION OF THIS DIVISION TO DETERMINE THE POSSIBILITY OF REDUCING THIS SECTION AND SHIFTING CERTAIN RESPONSIBILITIES TO OTHER STAFF SECTIONS WITHIN THIS HEADQUARTERS.

APPENDIX XXIV

DIVISION BULLETIN 1900, DATED 9 DECEMBER 1975
SETTING FORTH GUIDANCE ON THE MARINE CORPS
EXPEDITIOUS DISCHARGE PROGRAM

SOURCE: Official Records of 2nd Marine Division, Camp
Camp Lejeune, N.C.

UNITED STATES MARINE CORPS
2D MARINE DIVISION, FLEET MARINE FORCE
CAMP LEJEUNE, NORTH CAROLINA 28542

DivBul 1900
7/WPL/aef

9 DEC 1975

DIVISION BULLETIN 1900

From: Commanding General
To: Distribution List

Subj: Marine Corps Expeditious Discharge Program

Ref: (a) MCBul 1900 of 12 Nov 1975
(b) MCO P1900.16A, MARCORSEPMAN

1. Purpose. To implement the subject program within this Division and to provide background data on administrative discharges as guidance to commanders exercising special court-martial jurisdiction.

2. Background. Reference (a) established the Expeditious Discharge Program for those Marines who have clearly demonstrated nonproductivity which, if allowed to continue, would lead to an undesirable or punitive discharge.

a. Since April 1975, the Commanding General has directed a total of 1,390 administrative discharges. Of this total, 1,226 have been undesirable discharges and 164 unsuitable discharges.

b. In many cases, it has been difficult to categorize a case as warranting an undesirable or unsuitable discharge. Furthermore, many of the cases contain early indications that the Marine in question has no motivation for productive service.

3. Policy. Reference (a) outlines the Commandant's desire and the desires of the Commanding General.

4. Character of Discharge. Commanding officers exercising special court-martial jurisdiction shall ensure that each member discharged receives the type of discharge as warranted by his service record. Furthermore, attention is directed to paragraphs 6003 and 6004 of reference (b), which defines honorable and general discharges. Attention is also directed to the fact that only the Commanding General is authorized

DivBul 1900

9 DEC 1975

to direct the issuances of an honorable discharge in lieu of a general discharge.

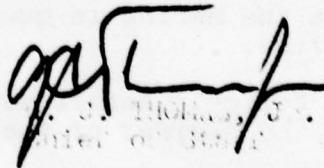
5. Forms and Reports Required. Enclosures (1) and (2) to reference (a) will be made available through Marine Corps Base self-service thereby precluding the need for unit reproduction. A copy of the discharge directive will be required by this Headquarters (Adj), and will serve as the required report. Prompt submission of unit diaries and accurate reporting is mandatory.

6. Action. Commanding officers shall ensure that the policy and the spirit of reference (a) are strictly observed. Those members deserving an undesirable discharge or punitive action will be referred through the normal command/staff channels.

a. When the individual is notified by his commanding officer that he is being referred for discharge under the subject program, a discharge physical examination will be requested concurrently.

b. Commanding officers exercising special court-martial jurisdiction shall ensure that each member discharged falls under the scope of the program as defined in paragraph four of reference (a). For consistency of action, regimental commanders will review all discharges directed prior to their being effected. The Assistant Chief of Staff, G-1 will represent the Commanding General as the reviewing officer for all separate battalion commanders.

7. Self-Cancellation. 31 October 1976


J. J. THOMAS, JR.
Chief of Staff

DISTRIBUTION: A

APPENDIX XXV

RIGHTS OF NAVY AND MARINE CORPS RESPONDENTS
DURING ADMINISTRATIVE DISCHARGE PROCEEDINGS

SOURCE: Civil Law Study Guide, Naval Justice School,
Newport, R. I., Revised November 1977.

ADMINISTRATIVE DISCHARGE PROCESSING AND REVIEW

0701 PROCESSING AN APPLICANT FOR DISCHARGE BY REASONS OF UNSUITABILITY,
PERSONAL USE OF DRUGS, OR MISCONDUCT

- a. Before potential candidates for administrative discharges by reason of the grounds listed below can be processed, notice, counseling, and a reasonable time to correct deficiencies must be provided, in certain instances, as discussed in the foregoing chapter. The next three subparagraphs describe the rights of the respondent in regard to the three major grounds: Unsuitability, Personal Use of Drugs, and Misconduct.
- b. Unsuitability (3420184; 6016)*; Personal Use of Drugs (3420183)
 - (1) Candidates for discharge who have less than eight years active duty have the following rights, and the procedures described below apply. (NOTE: With Personal Use of Drugs, there is no eight year restriction; however, discharge processing should not be initiated until all attempts have been exhausted to complete a minimum of 30 days counseling or rehabilitative assistance.)

(a) Rights:

- 1- To be informed in writing of the proposed discharge, specifically stating the reason or reasons;
- 2- To be afforded an opportunity to make a statement in writing; but
- 3- No right to present his case to, or have it otherwise heard by, an Administrative Discharge Board, exists.

NOTE: Where the service member declines to make a statement, this declination is to be obtained in writing, incorporated in the case file, and followed with signed entries on page 11 (USMC) or page 13 (USN) of his service record, as appropriate.

- 4- Be afforded the opportunity to consult with a lawyer within the meaning of Article 27b, UCMJ, providing performance marks would result in a General vice Honorable Discharge.

* All references are to BUPERSMAN and MARCORSEPMAN unless otherwise indicated.

If member is entitled to and requests counsel, and if one is not available, discharge proceedings must be held in abeyance until such time as one is available. (3420184.5). The Marines have no specific rule like this; however, 6025.c would seem to indicate they intend to follow the DOD directive 1332.14 of 3 Sept 1975.

(b) Documentary matters to be forwarded when processing:

- 1- A copy of the letter notifying the member of the reason(s) for the administrative processing and his rights;
- 2- The member's signed statement of awareness;
- 3- If applicable, the member's declaration to consult with, or waive opportunity to consult with, counsel;
- 4- The member's signed statement in his own behalf or his declination in writing;
- 5- Psychiatric or medical evaluations, details of the drug abuse, where appropriate, supporting the basis for discharge, except in inaptitude cases;
- 6- Copy of page 9, Service Record;
- 7- Copy of page 11 (USMC) or page 13 (USN) as appropriate;
- 8- CO's comments and recommendations.

(2) Candidates with eight or more years total active duty shall be afforded an opportunity to request or waive, in writing, any or all of the following privileges: (If held by civil authorities or not on active duty, this may be accomplished by registered mail.)

- (a) To have his case heard by an Administrative Discharge Board of not less than three officers;
- (b) To appear in person before such Board (unless in civil confinement or otherwise unavailable);
- (c) To be represented by counsel, a lawyer within the meaning of Article 27(b)(1), UCMJ.

NOTE: Where used in this chapter, the term "Board" refers to Administrative Discharge Board.

- (d) To submit statements in his own behalf;
- (e) To waive the above rights in writing. Prior to declaring his intentions concerning the above rights, the member must be given an opportunity to consult with counsel (a lawyer within the meaning of Article 27(b)(1), UCMJ. If the member waives his rights, include the same information as required above plus a signed copy of the waiver. If the member requests an Administrative Discharge Board, comply with the procedures established for such cases.

(3) Marine Corps -- Practice is virtually the same (see 6016; 6023.1a,b,c) except:

- (a) Member advised of purpose and scope of Navy Discharge Review Board and Board for Correction of Navy Records.
- (b) If 27(b) counsel is unavailable for representation before the Board, appropriate authority may certify on the permanent record the nonavailability of a lawyer so qualified and set forth the qualifications of the substituted nonlawyer counsel.
- (c) Member told that before waiving any of his rights it would be to his advantage to consult with a counsel and that he will be given an opportunity to do so.

c. Misconduct (3420185)

- (1) In each case processed in accordance with this article, the member, if his whereabouts is known, must be informed in writing as to the circumstances which are the basis for the contemplated action and must be afforded an opportunity to request or waive, in writing, any or all of the following privileges. If held by civil authorities or not on active duty, the member will be assigned a military lawyer counsel who shall inform the member of his rights and privileges. The military counsel may accomplish this by registered mail if the member does not reside or is not confined in the local area. The respondent has a right:
 - (a) To have his case heard by a Board of not less than three officers;
 - (b) To appear in person before such Board (unless in civil confinement or otherwise unavailable);

- (c) To be represented by counsel; and
- (d) To submit statements in his own behalf; or
- (e) To waive any or all the above rights in writing. Prior to declaring his intentions concerning the above rights, the member shall consult with counsel. If the respondent is in civil confinement or is not reasonably available, consultation with counsel may be accomplished by mail. If the member requests that his case be heard by a board of officers, the commanding officer shall convene an Administrative Discharge Board. In the event the member refuses to request or waive his privileges, a page 13 entry of explanation will be made and forwarded, along with other enclosures, to the Chief of Naval Personnel (Discharge Authority). The member shall be informed that his refusal to request or waive his rights will be treated as a request for these rights, and the case will be processed as if the member had requested all of his rights.

- (2) Marine Corps -- Procedure is virtually the same (see 6018, 6023), but note exception noted in Section 0701b(3)(c) cited above.

d. Summary

- (1) While counseling is required for most conduct which may give rise to separation for Unsuitability or Misconduct, the absence of counseling does not preclude the member's being processed. However, the Administrative Discharge Board and Discharge Authority may take this factor into consideration.
- (2) Service members must be afforded the opportunity to consult with lawyer counsel prior to determining whether to exercise or waive their rights. Any or all rights may be waived.

e. Agreement between Respondent and Commanding Officer to Waive Administrative Discharge Board and to Accept an Administrative Discharge Under Honorable Conditions

The Navy allows a member who is being processed for an OTHC Discharge to approach his commanding officer with an offer to waive his right to an Administrative Discharge Board in exchange for a discharge under honorable conditions. The commanding officer now has the authority to accept such an offer and bind the CNP. This applies in cases of misconduct,

and a formal agreement, as set forth in BUPERSMAN 3420186, along with the correspondence required by 3420185, is forwarded to the Chief of Naval Personnel. Counseling by a lawyer is a necessary part of this procedure. The request must be initiated by the service member, but the commanding officer may or may not enter into the agreement at his discretion. The member being processed must have indicated, in writing, his desire to exercise his rights before he can agree to waive them.

NOTE: The Marine Corps has no such rule.

0702 ADMINISTRATIVE DISCHARGE BOARDS (3420187; 6024)

- a. An Administrative Discharge Board may, by written order, be appointed by the following:
 - (1) In the Navy, any commanding officer
 - (2) In the Marine Corps:
 - (a) Any commander exercising GCM authority; or
 - (b) A District Director of a Marine Corps District; or
 - (c) Any Commanding Officer of a Marine Barracks; or
 - (d) Any subordinate Commanding Officer or Officer in Charge authorized by a competent Commanding Officer who has GCM authority.
- b. Administrative Discharge Boards are composed of three or more experienced officers of the Naval service, on active duty, at least one of whom is the rank of Lieutenant Commander or Major or higher (O-4).
 - (1) Officers on active duty, whether Regular or Reserve, may sit.
 - (2) Where the respondent is a member of the Reserve, a majority of the Board should be Reservists, if reasonably available.
 - (a) If a majority of Reservists is not available, one member must be a Reservist (3420187; 6024).
 - (b) The convening authority must certify in the record the reasons for the unavailability of the other Reservists (6024.2c).

- (3) Where the respondent is a woman, one member must be a woman, upon the written request of the respondent. (3420187; 6024)

(4) Minority Membership

- (a) If the respondent is a member of a minority group, the membership of the Board should, upon the written request of the respondent, include a minority member, normally of the same ethnic origin. (3420187; 6024.2d)

(5) Odd number appointments

- (a) In the Navy, BUPERSMAN recommends appointment of an odd number of board members in order to avoid evenly divided decisions. (3420187)

- (b) The foregoing requirement is not articulated in the MARCORSEPMAN.

c. The convening authority shall further detail an officer on active duty as Recorder and, where desired, an Assistant Recorder who may, upon the direction of the Recorder, perform any duty required of the Recorder.

- (1) He should be an experienced officer and can be either a warrant or commissioned officer. (3420187.1c; 6024.2a)
- (2) In the Marine Corps, like the Navy, the Recorder may be a lawyer within the meaning of Article 27(b), UCMJ. If, however, a respondent is in the Marine Corps and represented by counsel, the Recorder may not possess any greater legal qualifications than respondent's counsel. (6024.2a). Obviously, the same rule applies in the Navy.
- (3) His duties include clerical and preliminary preparation as well as presenting to the Board, in an impartial manner, all available information concerning the respondent.
- (a) He conducts a preliminary review of available evidence.
- (b) He interviews prospective witnesses (determining whom to call).
- (c) He arranges for the attendance of all witnesses for the government and military witnesses for the respondent.
- (d) He arranges for the hearing after consulting with the Board's Senior Member or Chairman and respondent's counsel. (6024.2a)

- (e) He may not attend the closed sessions of the Board nor participate in the determination of the Board's findings, opinions and recommendations. (3420187; 6024).
- (f) He prepares the report and record of the Board which, together with all allied papers, are forwarded through the chain of command.
 - 1- Usually a summarized (vice a verbatim) record of the testimony before the Board is sufficient.
 - 2- In the Navy, verbatim transcripts are discretionary with the Senior Member or the Recorder (3420187.1d) while, in the Marine Corps, they are subject to the discretion of the Convening Authority or the Chairman (6024.2a).
- d. There is no requirement that a reporter be appointed. However, where witnesses are expected to testify, the presence of a reporter is desirable.
- e. The Hearing Procedure before the Board
 - (1) An Administrative Discharge Board functions as an administrative rather than a judicial body; consequently, the rules of evidence which prevail at trials by court-martial do not apply.
 - (a) The Board should consider any competent evidence which is relevant and material to the case, subject to its discretion; but
 - (b) Whatever evidence it considers must be made available to the respondent prior to the hearing (3420187; 6024); and
 - (c) It should not exclude evidence simply because could have been excluded at a trial by court-martial (3420187; 6024).
 - (d) The Marine Corps provides that Boards shall not be provided any of the following: (6024.3m)
 - 1- Information concerning polygraph examinations unless raised by respondent; or

- 2- Those portions of investigative reports which cannot be made available to counsel for the respondent (i.e., NIS investigator's summary).

NOTE: The Navy has a provision relative to NIS investigations which is similar to the Marine Corps prohibition.

- (2) Witnesses are normally sworn and testify under oath or affirmation. All witnesses are subject to cross examination on their testimony and general credibility.
- (3) The respondent may be sworn and testify at his election. If he testifies (under oath) he may be cross-examined. The respondent has a second option which is to present a statement (presumably not under oath). If he wishes to make a statement, oral or written, he may not be cross-examined upon this statement. NOTE: The Marine Corps articulates this rule; the Navy does so only to a lesser extent. (3420187.4f; 6024.3e and 6024.7c).
- (4) *All witnesses, civilian or military, including the respondent, must be advised of their rights under the Privacy Act, 10 USC 552a, in accordance with BuPers Manual 3420187(6)(c).
- (5) At the outset of the hearing, the Chairman or Senior Member should inquire of the respondent concerning his knowledge of his rights. These rights vary, depending again on the branch of service. They consist of the following:
 - (a) To appear in person, with or without counsel, or, in his absence, have counsel represent him at all open Board proceedings;
 - (b) To challenge any voting member of the Board, for cause only (that the member cannot render a fair and impartial decision);
 - 1- In the Navy, if a member is challenged, the Convening Authority decides the challenge after considering its circumstances and the recommendations of the other Board members (3420187.4b).
 - 2- In the Marine Corps, the Board itself determines the propriety of a challenge to any member, after excluding that member. A tie vote or majority vote in favor of sustaining the challenge disqualifies that member from sitting. (6024.3(1)(2)).
 - (c) To submit an oral or written statement in his own behalf;

(d) To request the appearance of witnesses on his behalf; the Board (Navy) or Convening Authority (Marine Corps) will invite the witnesses to attend if it considers the witness's testimony material to the case:

-1- Civilian and inactive military witnesses must attend voluntarily;

-2- If an active duty military witness does not attend, the record should show the reason for his absence.

(e) To submit, either before the Board convenes or during its proceedings, any sworn or unsworn statements, depositions, affidavits, certificates or stipulations, including depositions of witnesses not reasonably available or unwilling to appear voluntarily;

(f) To testify under oath and submit to cross-examination or, in the alternative, to make (or submit) an unsworn statement and not be cross-examined;

(g) To question any witness who appears before the Board;

(h) To examine all documents, reports, statements and evidence available to the Board;

(i) To be apprised of and to interview all witnesses to be called;

(j) To have witnesses excluded except while testifying (6024.3p; 3420187.6b);

(k) To make argument.

NOTE: A failure on the part of the respondent to exercise any of these rights after being advised of them will not bar the Board proceeding.

(6) As a practical matter, in both the Navy and Marine Corps, since the rules of evidence do not apply to Administrative Discharge Board hearings, objections will be noted for the record, the Board will hear the evidence, and it will proceed with the hearing. Of course, the Board could refuse to consider any matters which it felt were irrelevant, immaterial, or unnecessarily repetitive or cumulative. By and large, however, the Board will consider

all matters which have a bearing on the case. Normally, the Senior Member or Chairman will have cognizance over matters relating to procedure. (3420187.4). In the case of a challenge, in the Navy the matter is referred to the convening authority. In the Marine Corps, after the challenged member has been examined and made any statement he desires to make, the Board in closed session (with the challenged member excluded) votes upon the challenge. A tie vote will result in the member being disqualified. (3420187.4b; 6024.31).

- (7) The Recorder presents the case for the government, providing the Board with complete and impartial information. The procedure for examination of each witness should be like that prescribed for trials by court-martial: direct examination by the counsel calling the witness; cross examination by the counsel for the other side; re-direct examination by the side calling the witness; re-cross examination by the adversary; questions posed (if any) by members of the Board.
- (8) Next, the respondent has the opportunity to present matters in his behalf. The Board proceedings should be sufficiently formal so as to allow the respondent full opportunity to present his case and exercise his rights. Where witnesses are called by the respondent, the examination procedures outlined above apply.
- (9) Following any matters presented by the respondent, the Recorder may, when he deems it appropriate, present rebuttal evidence. When the Recorder introduces rebuttal evidence, the respondent is entitled to do likewise.
- (10) Finally, prior to closing to deliberate, the Board may call any witnesses or hear other evidence it deems appropriate.
- (11) During the Board's closed sessions, members should rely on their judgment and experience in determining the weight and credibility to be given to the materials presented. BUPERSMAN is silent on the subject of burden of proof and standards of proof. The MARCORSEPMAN states that the burden is on the government and the standard of proof to be employed is the "preponderance of evidence" test.
 - (a) The Board must make:
 - 1- Findings of fact;
 - 2- Recommendations as to retention or discharge.

-3- If discharge is recommended, the basis therefor, as well as the character of the discharge, must be stated. (3420187.7a; 6924.4; 6024.5).

(b) In determining the character of the discharge to be recommended, the Board may consider only those matters which occurred during the current enlistment or period of service. (DOD Dir. 1334.14 and DOD Dir. 1332.19). This limitation does not exist in determining whether the member should be separated. It is not proper for the Board to further recommend suspension of the discharge or periods of probation. (3420187.7a; 6024.4b(1).) All members are required to sign the report of the Board beneath their respective positions (i.e., majority or minority).

(12) When the Board reassembles in open session, the respondent's right to discover its findings and recommendations and to receive a copy of the same or the record of proceedings varies, depending on the branch of the service.

(a) In the Navy:

- 1- The Senior Member shall orally advise the respondent of the findings and recommendations of the Board along with the type of discharge recommended.
- 2- The respondent is further entitled to a copy of the record of proceedings with all enclosures, but shall not be entitled to a copy of the Board's report, or a copy of the findings and recommendations, or a copy of the letter of transmittal forwarding the case. (3420187.7d).

(b) In the Marine Corps, the respondent is not entitled to be notified of the recommendations of the Board or the Convening Authority, or to receive copies of the Board's proceedings, its report or any endorsements on it. Convening authorities are permitted, however, to provide a respondent with the foregoing, subject to their discretion. (6024.7(f), 6024.7(g)).

f. The Record of Proceedings

- (1) The record of proceedings, which is authenticated in the Navy by the Senior Member and in the Marine Corps by the Chairman and the Recorder, is forwarded, together with

all exhibits and the Board's report, to the Convening Authority who, after reviewing the record, notes his concurrence or nonconcurrence in a letter of transmittal.

(2) The Contents of the Record of Proceedings

(a) In the Navy, the record of proceedings shall, as a minimum, contain:

- 1- A resume of the facts and circumstances;
- 2- Supporting documents on which the Board's recommendation is based, including (at least) a summary of all testimony;
- 3- The identity of respondent's counsel, including his legal qualifications;
- 4- The identity of Recorder;
- 5- A verbatim copy of the Board's Findings and Recommendations signed by all members; and
- 6- The authenticating signature of the Senior Member on the entire record of proceedings or, in his absence, any member of the Board; (3420187.7b).
- 7- Dissenting opinions of any member, if applicable, regarding discharge or type thereof.

(b) In the Marine Corps, the record of proceedings shall contain as a minimum:

- 1- An authenticated copy of the appointing order;
- 2- Any other communication from the Convening Authority;
- 3- A summary of the testimony of all witnesses, including the respondent when he testifies under oath or otherwise;
- 4- A summary of any sworn or unsworn statements made by absent witnesses, if considered by the Board;
- 5- The identity of the counsel for the respondent and his legal qualifications, if any;

- 6- The identity of the Recorder with his legal qualifications, if any;
- 7- Copies of the written documents tendered to the respondent containing advice as to the proposed discharge and its basis, right to counsel, right to Board consideration of his case (where appropriate);
- 8- Evidence of advice concerning the Navy Discharge Review Board and Board for Correction of Naval Records; evidence of periodic explanations of discharges and their possible adverse effects (required to be given in accordance with provisions of Article 137, UCMJ); and evidence of the notice, counseling, and reasonable time to correct deficiencies in the appropriate instances;
- 9- A complete statement of facts upon which the Board's recommendation for discharge is based;
- 10- A summary of any unsworn statement submitted by the respondent or his counsel;
- 11- Copies of any documents considered by the Board but not already listed; or
- 12- A description of any real evidence considered by the Board.

g. Action by the Convening Authority

(1) In the Navy: (3420187.8)

(a) If the Commanding Officer determines that the respondent should be retained, he closes the case, except for:

- 1- Homosexuality
- 2- Homosexual or other aberrant tendencies
- 3- Sexual perversion
- 4- Drug abuse involving sale or trafficking
- 5- Civil conviction, or
- 6- Fraudulent enlistment

which must be referred to CNP for final disposition.
(3420187.8)

- (b) If the Commanding Officer decides to, or must, forward the case, it is sent directly to the Chief of Naval Personnel.

(2) In the Marine Corps: (6024.9)

- (a) If the Convening Authority is not the appropriate discharge authority, he will forward the case through the chain of command and include his recommendation in a letter of transmittal to:
 - 1- The GCM authority, or
 - 2- Commandant of the Marine Corps (Code DK or AI, depending upon the reason for processing) for disposition. (6016.1; 6017.8a).
- (b) If the Convening Authority is the appropriate discharge authority, before taking final action, he will refer the case to his SJA for a written review to determine the sufficiency in fact and law of the processing, including the Board's proceedings, record and report.

NOTE: When final action by a discharge authority, other than CMC or SECNAV, has been taken involving the unsuitability of a member who has more than eight years continuous active duty or the misconduct of a member, the case must be forwarded to CMC for review. (6024.9c).

h. Action by the Discharge Authority

- (1) When the Discharge Authority receives the record of the Board's proceedings and report in an administrative discharge case, he may specifically take one of the following actions: (3420188(1)(2); 6024.9)
 - (a) Approve the Board's recommendation and direct execution of a discharge;
 - (b) Approve the Board's recommendation for discharge, but upgrade the type of discharge to a more creditable one;
 - (c) Approve the Board's recommendation for discharge, but change the basis therefor when the record indicates that such action would be appropriate, EXCEPT he shall not designate misconduct as the basis when the Board's basis was unsuitability;

- (d) Disagree with the Administrative Discharge Board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a discharge under honorable conditions with an honorable or general discharge;
- (e) Set aside the findings and recommendations of the Board and send the case to another Board hearing if he finds legal prejudice to the substantial rights of the respondent, or that findings favorable to the respondent were obtained by fraud or collusion;
- (f) Disapprove the recommendation for discharge and retain the member, or
- (g) Approve the recommendation for discharge, but suspend its execution for a specified period of time.

NOTE: Both the Navy and the Marine Corps provide a discharge authority with power to send a case to a second Board hearing as indicated. If a case is referred to a second Board hearing, neither members nor the Recorder of the first Board may sit as voting members on the second Board. Although the second Board may consider the record of the first Board's proceedings, less any prejudicial matter, it may neither see nor learn of the first Board's findings, opinions, or recommendation. Additionally, the discharge authority in the Marine Corps may not approve findings or recommendations of the subsequent Board which are less favorable to the respondent than those ordered by the previous Board. (6024.8g). In the Navy, CNP may not approve findings or recommendations less favorable to the respondent than those rendered by the previous Board when the basis for referral of the matter to a subsequent Board was legal prejudice to the substantial rights of the respondent (3420187.1f); whether such a limitation upon the authority of CNP exists when the basis for referral to a subsequent Board was fraud or collusion on the part of the respondent is uncertain.

-1- In the Navy:

The Chief of Naval Personnel will advise the commanding officer of the period and terms of the probation. Where the discharge concerned

is under conditions other than honorable, any vacation of the probation requires the prior approval of CNP. When a discharge under honorable conditions has been suspended by CNP, such suspension may be vacated without CNP's prior approval. (3420187.2). The Navy has no provision in BUPERSMAN for the detailed vacation hearing described below for the Marine Corps.

-2- In the Marine Corps:

- a- Any discharge authority may suspend the execution of an approved administrative discharge for a probationary period not to exceed one year, and, with the approval of the Commandant, may suspend a discharge in excess of one year. Upon the expiration of the period of probation or the period of enlistment or obligated service (whichever occurs first), the unexecuted discharge will automatically be remitted, unless it is sooner vacated.
- b- Action initially suspending an approved administrative discharge and subsequent action extending the period of suspension will be recorded on page 11 of the member's service record book, as provided in MARCORSEPMAN 6026.
- c- In regard to the basis for vacation of a suspended administrative discharge, normally violations of the UCMJ are contemplated.
 - [1] The discharge as originally approved prior to the suspension or one more favorable to the service member may be ordered into execution (6026.4b), depending on a later interpretation of the character of that member's overall service. (6026.14).
 - [2] The decision as to what course of action would be most appropriate is one of command but, where the immediate command to which the service member belongs does not possess special court-martial jurisdiction, a report containing the known evidence of the alleged misconduct or other basis for the proposed

vacation, together with a recommendation to that effect, must be forwarded to the officer in the chain of command possessing such jurisdiction over the member.

- [3] This latter officer may hold a hearing on the alleged violation of probation and require the service member in question to show cause why his alleged violation, as shown in the report, should not cause the suspension of his discharge to be vacated and ordered into execution. (6026.12b)

The service member has the same right to be represented by counsel at their hearing as he does during a Board hearing. When certified 27(b) counsel is not available, the officer ordering the proceeding must certify and explain the non-availability of such counsel in the record of the vacation hearing.

This officer (having special court-martial jurisdiction) must submit a report of the hearing, together with his recommendation (neither of which shall be made available to the member unless the appropriate GCM authority provides otherwise), to the GCM authority, who can then vacate the suspension of the discharge and order it into execution.

- [4] The foregoing requirements concerning a hearing in which the member is represented by counsel are required in order to vacate the suspension and order the execution of the discharge only in the following circumstances: where the suspended discharge is an OTHC discharge; or where the suspended discharge is by reason of unsuitability in the case of a member with eight or more years continuous active duty.

- [5] In all other circumstances, the discharge authority may vacate the suspended discharge and order its execution without further hearings or proceedings. (6026.11; 6026.12).

- (2) Under no circumstances may a discharge or basis therefor be less favorable than that originally recommended by the Board. (3430187.1; 6024.9)

0703 TRANSFER AWAITING DISCHARGE

- a. Navy Personnel. Navy personnel processed for administrative discharge will normally be retained on board their commands. Under certain circumstances, however, the individual may be transferred to a separation activity to await instructions from the Chief of Naval Personnel after being processed by their commands and recommended for discharge, but procedures vary according to the basis for the discharge and the activity to which the member belongs.
- (1) Unsuitability: Members recommended for discharge will be retained at their own command pending instructions from CNP, unless a waiver is requested from CNP. Such waivers will be granted only in extreme situations. (3420184.8).
- (2) Misconduct: Normally, personnel processed for misconduct will be retained on board pending receipt of instructions from CNP. If circumstances indicate that transfer is in the best interest of the Navy and the individual, a request for transfer, with the reason therefor, may be sent to CNP. (3420185.f2).
- b. Where fully processed members serving in their first enlistment are awaiting separation at a large separation activity, the provisions of BUPERSINST 1910.22 allow for discharge at member's request prior to action by CNP in order to reduce the great number of personnel awaiting discharge. This has been termed "Project Expedite."
- c. Marine Corps Personnel. Marine Corps procedures vary somewhat because of the fact that Marine general officers exercising GCM jurisdiction may direct discharge in many cases.

(1) Misconduct

- (a) If the discharge is for misconduct, and the individual is serving outside the United States, he shall be transferred to the nearest Marine Corps activity in the United States by the officer who directs the discharge.

NOTE: A discharge authority other than CMC or SECNAV must include the discharge authority in the orders transferring the member to CONUS.

- (b) If the discharge is for misconduct, and the individual is serving at the command of a commander not under the command of a Marine general officer authorized to direct discharge, the individual will be transferred to the nearest Marine Corps activity in CONUS if he is recommended for discharge and has waived his right to a Board.

NOTE: Commanders effecting transfer of service members to CONUS must indicate in the endorsement on the record of proceedings the Marine Corps activity (CONUS) to which the member is being transferred.

- (2) Unsuitability. There is no provision for transfer of individuals recommended for discharge by reason of unsuitability.

NOTE: CMC has provided that commanders exercising CCM or SPCM jurisdiction may approve applications for indefinite periods of excess leave (no pay) to any member awaiting completion of administrative discharge proceedings for other than expiration of enlistment fulfillment of service obligation when all proceedings except final action of the discharge authority have been completed, and the officer granting the leave reasonably anticipates that the discharge will be executed. (Marine Corps Leave and Liberty Regulations MCO 1050.3.)

0704 THE NAVY DISCHARGE REVIEW BOARD (5040200; 6001.6)

- a. The Navy Discharge Review Board, whose governing procedures are contained in NAVEXOS P-70, consists of five members and was established pursuant to 10 USC 1553 in order to review the type and nature of final discharges to determine, according to reasonable standards of naval law and discipline, whether and how those discharges should be changed, corrected, or modified. The Board is further empowered, where appropriate, to issue a new discharge. The Board is composed of active duty officers of the Navy and Marine Corps.
- b. The Review Board may not review discharges awarded by a general court-martial or executed more than 15 years before the application; however, it may consider all other discharges:

- (1) On its own motion; or
 - (2) Upon the request of a former member; or
 - (3) Upon the request of a surviving spouse, next of kin, legal representative, or guardian, where the former member is deceased or incompetent.
- c. Although the Discharge Review Board may not revoke executed discharges, reinstate persons into the military, waive discharges otherwise disqualifying persons from reenlisting in any of the Armed Forces, or determining eligibility for veterans' benefits, it may, nevertheless, recommend reenlistment as part of its decision in any case. This recommendation, however, is not binding on the Chief of Naval Personnel, the Commandant of the Marine Corps, or the Secretary of the Navy.
- d. In order to change, correct, or otherwise modify a discharge certificate or issue a new certificate, the Board must be convinced that the original certificate was "improperly or inequitably" given. In making its determination, the Board is usually confined to evidence of the former member during the particular period of Naval service for which the discharge in question had been issued, including any information disclosed to or discovered by the Naval service at the time of enlistment or other entry into the service. This evidence may, and indeed should, include facts "found" by a fact-finding body, such as a court-martial, a court of inquiry or investigation in which the former member was a party, and which were properly approved either on appeal or during review. Unless this former member can show that coercion was exercised on him, the foregoing should include charges and specifications to which guilty pleas were appropriately entered in court, or which prompted the former member to request discharge for the good of the service.
- e. Action taken by the Discharge Review Board is reviewable only by the Secretary of the Navy. If newly discovered evidence is presented to the Board, it may recommend to SECNAV reconsideration of a case formerly heard, but it may not reconsider a case without the prior approval of SECNAV.

APPENDIX XXVI

MEMORANDUM FOR MR. JAMES J. ALLEN, DEPARTMENT OF DEFENSE,
SETTING FORTH COST DATA FOR COURTS-MARTIAL

SOURCE: Copy of Memorandum given to author on 12 April
1978 by the Criminal Law Division, Army JAG,
Washington, D.C.

DAJA-CL 1977/2235

2 AUG 1977

MEMORANDUM FOR: MR. JAMES J. ALLEN, DEPARTMENT OF DEFENSE,
OFFICE OF ASSISTANT GENERAL COUNSEL,
INTERNATIONAL AFFAIRS

SUBJECT: Cost Data for Courts-Martial

1. Reference your memorandum of 26 July 1977, requesting cost data for courts-martial.
2. The total number of courts-martial tried, Army-wide, during calendar year 1976, and the estimated cost for each type of court-martial are inclosed. The cost of a court-martial depends on many factors including, but not limited to, the plea of the accused, the complexity of the case, and the composition of the court, i.e., whether the court includes members or is tried by military judge alone. Accordingly, these cost data are estimates, not actual expenditures for each case.

Signed

1 Incl
as

WAYNE E. ALLEY
Colonel, JAGC
Chief, Criminal Law Division

Estimated Court-Martial Costs

General court-martial	\$5831.27
Special court-martial (BCD)	3573.60
Special court-martial	2369.44
Summary court-martial	660.06

Total Courts-Martial, Army: CY 1976

General courts-martial	1348
Special courts-martial (BCD)	936
Special courts-martial	5169
Summary courts-martial	1659



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

July 26, 1977

MEMORANDUM FOR COLONEL WAYNE E. ALLEY, USA, CHIEF, CRIMINAL
LAW DIVISION, JAG, DEPARTMENT OF THE ARMY

SUBJECT: Request for Information

The General Counsel's Office is currently engaged in a study which inter alia, compares the efficiency of the military judicial system with that of the Federal courts in criminal cases. Although of lesser importance, cost is one basis for comparison.

From our discussions, I understand that your office has figures giving the per case cost of cases subject to Army trial procedures. Such statistics would be useful to this study and I would very much appreciate it if you would make them available to our office.

A handwritten signature in dark ink, reading "James J. Allen", is positioned above the typed name.

James J. Allen
Office of Assistant General Counsel
International Affairs

ESTIMATED COURT-MARTIAL COSTS

GCM

1. Preparation of charges (preliminary administrative functions)	\$ 108.13
2. Article 32, UCMJ, Investigation	633.80
3. Attorney and judge expenses (trial level)	
a. Pre-referral	75.60
b. Trial judge	367.68
c. Trial/defense counsel	528.64
d. Post trial	279.55
4. Non-attorney expenses (trial level)	
a. Legal clerks, administrative personnel	97.36
b. Court members (7 members, ave. grade 0-4)	1442.70
c. Witnesses	723.68
d. Accused	70.80
e. Court reporter	218.56
5. Travel expenses	
a. Witnesses	250.00
b. Military judge (when required to travel)	75.00
6. Appellate expenses (attorney and non-attorney)	
a. Clerk of Court and miscellaneous	125.94
b. Army Court of Military Review	224.92
c. Government Appellate	256.03
d. Defense Appellate	<u>352.88</u>
TOTAL	\$5831.27

SCM

1. Preparation of charges (preliminary administrative functions)	\$108.13
2. Attorney expenses (advising convening authority, officer detailed as summary court-martial and accused)	71.60
3. Trial expenses	
a. Summary court-martial (officer detailed as SCM)	137.40
b. Witnesses	271.38
c. Accused	53.10
4. Review	<u>18.45</u>
TOTAL	\$660.06

SPCM (PCD)

1. Preparation of charges (preliminary administrative functions)	\$ 108.13
2. Attorney and judge expenses (trial level)	
a. Pre-referral	48.75
b. Trial judge	139.35
c. Trial/defense counsel	330.40
d. Post trial	235.84
3. Non-attorney expenses (trial level)	
a. Legal clerks, administrative personnel	97.36
b. Court members (5 members, ave. grade 0-4)	687.00
c. Witnesses	452.30
d. Accused	53.10
e. Court reporter	136.60
4. Travel expenses	
a. Witnesses	250.00
b. Military judge (when required to travel)	75.00
5. Appellate expenses (attorney and non-attorney)	
a. Clerk of Court and miscellaneous	125.94
b. Army Court of Military Review	224.92
c. Government Appellate	256.03
d. Defense Appellate	<u>352.00</u>
TOTAL	\$3573.60

SPCM

1. Preparation of charges (preliminary administrative functions)	\$ 108.13
2. Attorney and judge expenses (trial level)	
a. Pre-referral	17.90
b. Trial judge	139.35
c. Trial/defense counsel	330.40
d. Post trial	51.62
3. Non-attorney expenses (trial level)	
a. Legal clerks, administrative personnel	97.36
b. Court members (5 members, ave. grade 0-4)	687.00
c. Witnesses	452.30
d. Accused	53.10
e. Court reporter	57.28
4. Travel expenses	
a. Witnesses	250.00
b. Military judge (when required to travel)	75.00
5. Article 69, UCMJ, review expense	<u>50.00</u>
TOTAL	\$2369.44

APPENDIX XXVII

CMC MESSAGE 082340Z, MARCH 1978,
REDUCING ANNUAL TRAINING ALLOWANCES

SOURCE: Official Records, Headquarters, Marine Corps,
Washington, D.C.

1 03

RR RR

UUUU

062340
872346Z MAR 78

NO

CMC WASHINGTON DC

CG FMFPAC

CG FMFLANT

CG FOURTH MARDIV

INFO CG THIRD MARDIV

CG SECOND MARDIV

CG FIRST MARDIV

CG FIRST MAR BDE

CG FORTRPS PAC

CG FORTRPS FSSG LANT

UNCLAS //NO8011//

CLASS V(N) AMMUNITION TRAINING ALLOWANCES (CODE OTTU)

A. MCO P8011.4E

1. REF A ESTABLISHES MARINE CORPS PEACETIME AMMO ALLOWANCES. REDUCED STOCKPILES FROM THOSE EXPERIENCED DURING THE SEA CONFLICT, INCREASING FISCAL CONSTRAINTS AND THE IMPACT OF A HIGH INFLATION RATE ON THE COST OF REPLACING AMMO EXPENDED HAVE CREATED A PROHIBITIVE COST SITUATION. FOR EXAMPLE, A 105MM HE ROUND WHICH COST \$24 IN FY68 COSTS \$82 TO REPLACE IN FY78. PRESENT AND PROJECTED FUNDING

OTTU, OTTS, OTD, L, FD, RD, RP, RES

HUGHES, MAJ, OTTU128, 4081AR

NGEN, USMC

DC/S, O&T

J. H. Miller

TOTAL 8

UNCLASSIFIED

02 03

RR RR

UUUU

CONSTRAINTS WILL NOT MAINTAIN PWR STOCKS AT ACCEPTABLE LEVELS AND AT THE SAME TIME PERMIT CONTINUED EXPENDITURE OF AMMO FOR TRAINING AT RATES NOW AUTH BY REF A.

2. CONSEQUENTLY, A REDUCTION IN EXPENDITURE OF TRAINING AMMO MUST BE REALIZED. A 20 PERCENT REDUCTION IN ALLOWANCES AUTHORIZED REF A FOR THE BELOW AMMO IS BEING CONSIDERED BY THIS HQ. REDUCTION WOULD BE EFFECTIVE BEGINNING FY79.

DODIC	ITEM DESCRIPTION	DODIC	ITEM DESCRIPTION
A071	CTG, 5.56	D541	CHG, PROP, WHITE BAG
A131	CTG, 7.62 LINKED	D544	PROJ, HE {155MM}
C226	CTG, ILLUM {81MM}	D550	PROJ, SMOKE, WP {155MM}
C276	CTG, SMOKE WP {81MM}	D675	CHG, PROP, GREEN BAG
C445	CTG, HE {105MM}		{8" SP}
C449	CTG, ILLUM {105MM}	D676	CHG, PROP, WHITE BAG
C477	CTG, SMOKE, WP {105MM}		{8" SP}
D505	PROJ, ILLUM {155MM}	D680	PROJ, HE {8" SP}
D540	CHG, PROP, GREEN BAG {155MM}		

3. THE REDUCTION RECOMMENDED FOR THE 5.56MM CTG DODIC A071 WOULD NOT APPLY TO REQUALIFICATION ALLOWANCES.

03 03

RR RR

UUUU

4. THROUGH MORE EXTENSIVE USE OF SUBCALIBER DEVICES/TRAINING AMMO NOT PREVIOUSLY AVAILABLE, AND PRUDENT MGMT OF FULL SERVICE AMMO ALLOWANCES, IT IS BELIEVED THAT REDUCTIONS CAN BE ACCOMPLISHED WITHOUT SIGNIFICANT IMPACT ON TRAINING AND READINESS. IF REDUCTION OF ANY OF ABOVE AMMO CONSIDERED TO IMPOSE SERIOUS CONSTRAINTS ON TRAINING THAT WOULD DEGRADE READINESS REQUEST:

- A. IDENTIFY ITEM BY DODIC.
- B. INDICATE MIN ACCEPTABLE ALLOWANCE.
- C. PROVIDE RATIONALE/JUSTIFICATION.

PROVIDE RESPONSE TO CMC {CODE OTTU} BY 1 APR 78.

5. REF A ESTABLISHES PROCEDURES FOR ANNUAL SUBMISSION OF RECMD ALLOWANCE CHGS TO CMC BY 1 APR EA YR. REQ UPCOMING REVIEW INCLUDE COMPREHENSIVE REVIEW OF ALL FMF ALLOWANCES CONTAINED REF A TO IDENTIFY ANY AUTHORIZATION FOR QUANTITIES OF AMMO IN EXCESS OF VALID TRAINING RQMTS. ANY COST SAVINGS THAT CAN BE REALIZED THROUGH REDUCTIONS OR ELIMINATION OF NON-ESSENTIAL ALLOWANCES COULD PROVIDE OFF-SET THAT MIGHT PRECLUDE REDUCTION IN MORE ESSENTIAL AMMO ITEMS OR PERMIT ENHANCEMENT OF PWR POSTURE.

APPENDIX XXVIII

FMF LANT MESSAGE 031939Z, APRIL 1978, STATING
REDUCTION IN AMMUNITION ALLOWANCES WOULD IMPAIR READINESS

SOURCE: Official Records, Headquarters, Marine Corps,
Washington, D.C.

ROUTINE

PT 02014

094/03107

PAGE 01

CMC	DEF	HQSC	MCUB	OT	I	RFL	JA	2	PA	3/1	MM	8/3
ACMC	GME	HQSM	MED	OTOC	RP	I	MCDO	2	RES	3	FD	5/1
CS	WD	IG	MR	P	SPD	RD	2	HQBN	4	CC	7	LA
CI	HQS	P	OLA	PL	INT	2	MSG	3	MP	4	OTT	7/1

RTTUZYUW RUI SSGG5092 0931939-UUUU-RUEACMC.

ZNR UUUUU

R 031939Z APR 78

FM CG FMFLANT

TO RUEACMC/CMC WASHINGTON DC

TNFO RUHQHQA/CG FMFPAC

RUFRODD/CG SECOND MARDIV

RUERDOB/CG FORTRPS SECOND FSSG LANT

BT

UNCLAS //NOFORN//

FOR: CMC OT INFO: CMC LMG, PAC ORDO, DIV G-4, ORDO, FORTRPS

CS

CLASS V(W) AMMUNITION TRAINING ALLOWANCES

A. CMC 082340Z MAR 78

B. CG SECOND MARDIV 292033Z MAR 78

1. REF A REDUCED THE ANNUAL TRNG ALLOW FOR SELECTED AMMO TTFS AND STATED THAT JUSTIFICATION SHOULD BE SUBMITTED FOR ANY ITEM THAT WOULD DEGRADE READINESS.

2. REF B STATES THAT DUE TO INCREASED AND INTENSIFIED TRNG THE 70 PERCENT REDUCTION WOULD IMPAIR THIS TRNG AND REDUCE THE READINESS OF THE 2D MARDIV.

3. REQ THAT THE AMOUNTS OF SELECTED AMMO LISTED REF B BE

PAGE 02 RUISSGG5092 UNCLAS

CONSIDERED AS THE MIN ACCEPT ALLOW AND NO REDUCTION BE IMPOSED.

BT

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ROUTINE

APPENDIX XXIX

MEMORANDUM FOR THE RECORD OF BRIEFING AT HEADQUARTERS,
MARINE CORPS, REGARDING FUNDING PROBLEMS
TO SUPPORT FMFPAC COMBAT TRAINING

SOURCE: Official Records, Headquarters, Marine Corps,
Washington, D.C.

FDB-d8-pab
1 MAY 1978

MEMORANDUM FOR THE RECORD

Subj: FMFPAC Comptroller Briefing of the FY 78 FMFPAC Midyear Review

1. At 0900, 13 April 1978, Colonel Robert E. LOEHE, USMC, FMFPAC Comptroller, provided a briefing on the FMFPAC FY 78 O&MMC Mid-Year Review submission.

2. Present for the briefing were:

MajGen H. A. Hatch	DC/S I&L
MajGen E. J. Brnars	DC/S R&P
Mr. E. T. Canstock	FDMC
BGen R. A. Kuci	Dir., Trng Div
BGen J. J. Went	DFDMC
Colonel C. M. C. Jones	XO FD
Colonel A. Lukeman	RPP
Colonel R. E. Jamison	FDB
Colonel F. L. Tolleson	FDB
Mr. P. P. Pirhalla	FDB

3. The briefing provided an overview of the methodology and prioritization process used by HQ FMFPAC in conducting their FY 78 mid-year review. Key observations/conclusions reached by FMFPAC during their review process are:

- a. FMFPAC needs more money.
- b. FMFPAC is not forecasting doom.
- c. FMFPAC is taking management action.
- d. They do not expect funding for lower priority deficiencies.
- e. They expect funding for civilian pay raises, yen-dollar devaluation and utilities cost increases.
- f. Deficiencies are anticipated to grow until about mid FY 79.
- g. They focused their attention on those deficiencies which affect their ability to sustain operations in subsequent periods and that are affected by the amount of training conducted. The major problem is balancing training requirements against materiel readiness within severe funding constraints while maintaining a minimum C-2 in readiness. The decision was made to recommend emphasis on materiel readiness with priority one deficiencies of \$8.3 million.

4. As a result of the problem as identified during the briefing and the ensuing discussions, two related major issues that require early resolution are as follows:

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a. Sponsorship and control within the O&MMC appropriation for FMF organizations.

(1) Discussion. FMF combat readiness is highly dependent on units having the correct quantity of properly maintained equipment with personnel appropriately trained to carry out the assigned mission. O&MMC funds provided to the FMF commanders are expended primarily in unit training and in equipment maintenance and replenishment. The tempo of training operations and its associated expenditure of funds and its related impact on materiel readiness dictate the level of funding required. DC/S O&T is responsible for Marine Corps training and readiness yet has no official control or responsibility for funds issued to the FMF.

Budget Activity 2, General Purpose Forces, within the O&MMC appropriation, contains the majority of the funds that support the Fleet Marine Force activities (Budget Project 2A, Forces). DC/S I&L is both the appropriation sponsor and the HQMC O&MMC Cost Center for Budget Project 2A. DC/S O&T is the O&MMC Cost Center for Tactical Airlift contained in Budget Project 2A.

(2) Recommendation

(a) Under the overall O&MMC appropriation sponsorship of DC/S I&L, establish DC/S O&T as the O&MMC Cost Center for the following:

<u>Budget Project</u>	<u>Title</u>
2A-1	FMF Ground & Air Support; Support of Marine Detachments on Navy Ships
2A-2	Tactical Airlift
2C	Management Hqtrs - FMF
2C-1	Hqtrs - FMF (JCS Exercises)

(b) The initial step to implement this recommendation is to make the appropriate change in the HQMC Budget Manual. It is recognized that the current Plans and Budget Branch within O&T is not adequately staffed to fully handle the cost center function. Implementation may require additional financial personnel billets although this requirement may be satisfied through internal realignment within the headquarters.

(3) Action Required. The Fiscal Division initiate appropriate change to HQO P7100.1C (Budget Manual, Headquarters, Marine Corps) and chair an ad hoc committee to assist DC/S I&L and DC/S O&T in determining necessary personnel staffing of the O&T Plans and Budget Branch.

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b. Unit training requirements and the balancing of materiel versus training readiness must be established and promulgated in HQMC directives as the benchmark for development of FMF budgets.

(1) Discussion. The FMF O&MMC budget is driven by the tempo of training events and the concomitant requirement to maintain and replace equipment. The FMF commander must continually make tradeoffs between conducting training and maintaining his material readiness. At present, the quantity of training required is highly subjective whereas equipment maintenance and replacement is objective and quantifiable. The Marine Corps Combat Readiness Evaluation System will provide a means of measuring the results and/or quality of training. A missing factor is the amount of training required and its associated costs. On 5 Aug 1977, the Chief of Staff directed DC/S O&T to establish an ad hoc working group to develop a Marine Corps Training Exercise Plan. This ad hoc group was made responsible for the following tasks:

- "(a) Develop a milestone schedule.
- (b) Review the current Marine Corps process of scheduling training exercises and the variables that impact upon the planning and execution of those exercises.
- (c) Design an automated exercise data/cost collection format in conjunction with FMF commands.
- (d) In conjunction with the above, provide recommended policies, guidance and procedures to be used in the development of a long range training exercise plan and its integration into the overall planning, programming and budgeting process.
- (e) Test the plan.
- (f) Upon approval, install the automated collection system and provide for the promulgation of planning guidance throughout the Marine Corps."

To date, the ad hoc group has completed the first two tasks and is making slow progress on the third. The Marine Corps Training Exercise Plan being developed is now known as TRACES (Training Requirements and Cost Evaluation System). The basic conceptual framework for TRACES has been briefed to the Chief of Staff's Committee and approved for further development. The TRACES concept has been briefed to the FMFLANT staff and FMFLANT has volunteered to test TRACES as soon as possible. CG FMFPAC has not been

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briefed on TRACES and is interested in the concept. Several key members of the TRACES working group have been or are due for transfer this Summer. TRACES appears to be at that stage of development that requires bringing the necessary expertise, time and money to get it fully developed.

(2) Recommendation. As soon as possible:

(a) Establish TRACES as a top priority project of HQMC.

(b) Send TRACES briefer(s) to HQ FMFPAC to brief concept to CG, FMFPAC and to obtain FMFPAC ideas on concept.

(c) Establish TRACES working group as a full-time effort. (The development of MCCRES provides an example of the value of having full time group.)

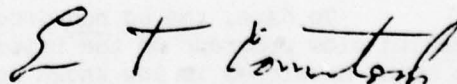
(d) Provide TRACES working group with necessary office space, clerical assistance and funds to complete test directive.

(3) Action Required

(a) The DC/S O&T, as sponsor of the TRACES working group, initiate appropriate C/S memorandum to change status of the working group from temporary/part-time to full-time.

(b) Two representatives from the TRACES Ad Hoc Working group (one each from O&T and FD) go to FMFPAC and brief CG FMFPAC and his staff on the TRACES concept. TAD funds to be made available by O&T and FD, with request to HQSpt to replenish from Chief of Staff TAD reserve.

(b) Funds for support of TRACES working group to be provided by HQspt, with replenishment from CMC Unencumbered Reserve as required.


E. T. COMSTOCK

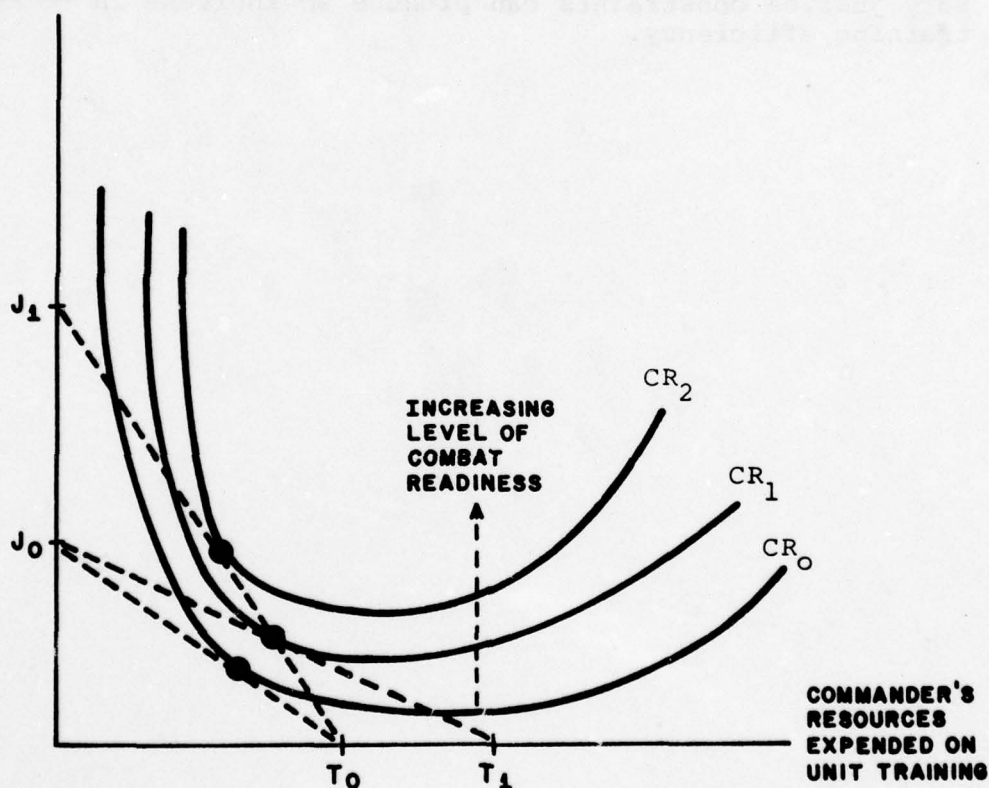
APPENDIX XXX

ISOQUANT CHART DEMONSTRATING INTERPLAY BETWEEN
RESOURCES EXPENDED ON MILITARY JUSTICE AND COMBAT READINESS

SOURCE: Drafted by Lieutenant Colonel Jerry Jenkins,
U.S. Marine Corps, on 29 May, 1978 at the author's
request.

Appendix XXIII

COMMANDER'S
RESOURCES
EXPENDED ON
MILITARY
JUSTICE



COMMENTS

1. The line $J - T_0$ represents a situation where the Commanding Officer expends part of his resources on training and part of his resources on military justice. These quantities are, respectively, represented by T_0 and J_0 . They achieve, collectively, a Combat Readiness (CR_0) level represented by the curve labeled CR_0 . This curve is called an isoquant and is analogous to a contour line on a military map, all points of which are equal in elevation. Combat readiness is analogous to elevation.

COMMENTS (cont'd)

2. If present rights accorded the accused are relaxed, the Commanding Officer's resources can be applied more efficiently. Two choices are possible: either training is held constant and resources applied (effectively) on military justice are increased (line T_0-J_1) (isoquant CR_1), or military justice time and expenditures are held constant and the savings applied to training (line J_0-T_1) (isoquant CR_2).

3. In either case, effectiveness increases, and so does efficiency. As the Commanding Officer's options have been conceptionally portrayed, a relaxation of military justice constraints can produce an increase in training efficiency.

END
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DDC